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NO. _____

IN THE

Supreme Court of the United States

October Term, 1983

LOUIE L. WAINWRIGHT
Secretary,
Florida Department of Corrections,

Petitioner

vs.

WILLIE JASPER DARDEN

Respondent.

Petition for Writ of Certiorari
to the United States
Court of Appeals for the
Eleventh Circuit

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QUESTIONS PRESENTED

TO WHAT EXTENT DOES THE PRESUMPTION OF CORRECTNESS DOCTRINE CONTEMPLATED IN 28 U.S.C. §2254(d) APPLY TO A DETERMINATION THAT A JUROR WAS PROPERLY EXCUSED FOR CAUSE UNDER WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968)?

IRRESPECTIVE OF ANY SUCH STATUTORY APPLICATION, DID THE COURT OF APPEALS NEVERTHELESS DECIDE THE WITHERSPOON ISSUE IN A WAY IN CONFLICT WITH THE DECISIONS OF THIS COURT?

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OPINIONS BELOW

The opinion of the Court of Appeals, Eleventh Circuit, is not yet reported and appears in the appendix as A-1 to A-145. The original panel opinion which reviewed the judgment of the district court, Darden v. Wainwright, 513 F.Supp. 947 (M.D. Fla 1981), appears as Darden v. Wainwright, 699 F.2d 1031 (11th Cir. 1983). Rehearing en banc was granted and the judgment of the district court was initially affirmed. Darden v. Wainwright, 708 F.2d 646 (11th Cir. 1983). That decision was vacated, however, and the cause was once again heard en banc. Darden v. Wainwright, 715 F.2d 502 (11th Cir. 1983).

The opinion of the Florida Supreme Court on direct appeal is reported as Darden v. State, 329 So.2d 287 (Fla. 1976).

JURISDICTIONAL STATEMENT

The decision of the Eleventh Circuit Court of Appeals was entered on February 22, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV of the Constitution of the United States provides, inter alia, that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Amendment VI provides that:

> In all criminal prose-

cutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 28 U.S.C. §2254(d) provides that:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall es-

tablish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court

proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

Willie Jasper Darden, on September 8, 1973, committed a series of crimes which resulted in his being charged with and convicted of the first-degree murder of Carl Turman, the robbery of Helen Turman and the assault with the intent to commit murder of Phillip Arnold.[1] The trial jury recommended that Darden be sentenced to death and the trial judge entered that sentence.

Darden appealed the convictions and sentence to the Florida Supreme Court and that court affirmed. Darden v. State, 329 So.2d 287 (Fla. 1976). Darden then peti-

1 The particular facts of the crimes, though not relevant to this proceeding at this time, can be found in more detail in Darden v. State, 329 So.2d 287 (Fla. 1976), and this Court's files in Darden v Florida, Case No. 76-5382. See also A-148-149.

tioned this Court for a writ of certiorari raising issues directed to the prosecutor's closing argument, the pre-trial identification, and the excusal of certain veniremen from the jury. This last claim was based on an alleged violation of this Court's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968).

The petition was granted on November 1, 1976. Darden v. Florida, 429 U.S. 917 (1976). After Darden's brief on the merits was filed, by order entered January 10, 1977, the Court limited the issues for consideration to the one dealing with the prosecutor's closing argument. Darden v. Florida, 429 U.S. 1036 (1977). After that issue was briefed and orally argued, the Court entered an order dismissing the writ as improvidently granted. Darden v. Florida, 430 U.S. 704 (1977).

In May of 1979, the Governor of Florida signed a warrant for Darden's

execution. Darden filed a petition for writ of habeas corpus in the United States District Court, Middle District of Florida. A stay of execution was entered and an evidentiary hearing was held before a magistrate on October 22 and 23, 1979, on a claim of ineffective assistance of counsel. On April 10, 1981, the magistrate filed his report and recommended that the petition for writ of habeas corpus be granted on the claims of prosecutorial misconduct and improper excusal of prospective jurors. Both Darden and the State of Florida filed objections to the report and recommendation and after considering the report and recommendation in light of those objections, the district court entered its judgment and memorandum opinion denying Darden's petition for writ of habeas corpus. Darden v. Wainwright, 513 F.Supp. 947 (M.D. Fla. 1981).

An appeal from that judgment was

taken to the Court of Appeals, Eleventh Circuit. On February 14, 1983, that court, by a two-to-one decision, affirmed the judgment of the district court. Darden v. Wainwright, 699 F.2d 1031 (11th Cir. 1983). Rehearing en banc was requested and granted and on July 1, 1983, because the en banc panel was equally divided, six to six, the decision of the district court was affirmed. Darden v. Wainwright, 708 F.2d 646 (11th Cir. 1983). A second petition for rehearing en banc was filed and on September 1, 1983, a decision was entered by the en banc court vacating the July 1, 1983 order and directing that the cause would once again be considered. Darden v. Wainwright, 715 F.2d 502 (11th Cir. 1983).

On February 22, 1984, the en banc court entered its decision affirming the district court on the issues of ineffective assistance of counsel and prosecu-

torial misconduct and reversing on the issue based on the Witherspoon claim.

That which is factually relevant to this petition is as follows.

A little over 10 years ago when a pool of people were selected for jury duty for purposes of Darden's trial, the state trial judge explained to that group of people the process under which some of them were soon expected to perform. Florida's bifurcated system in capital cases was thoroughly and accurately explained. A-121-124. The court then told the group that he would ask each of them an indentical question and admonished them to listen carefully:

> ...I want to know if any of you have such strong religious, moral, or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts presented to you

> should be such as under the law would require that recommendation? A-126

Trial court then began the individual questioning on this subject and asked the first prospective juror:

> . . . Mrs. Macy do you hold such conscientious moral or religious principles in opposition to the death penalty you would be unwilling under any circumstances to recommend the death sentence? A-127.

When this inquiry was put to prospective juror Varney, the gentleman answered, "Yes, sir." A-127. (Mr. Varney worked as a radio announcer at an Ocala radio station. R-40) Upon receiving that response the trial court questioned:

> You feel then, sir, that even though and I am not saying it will it would be purely speculative, in the event that the evidence should be such that under the law that should be the legal recommendation you would be unwilling to return

> such a recommendation because of your conscientious beliefs? (R-44)[2]

Mr. Varney stated in response, "I believe I would." Mr. Varney was then excused over objection. A-128.

As jurors were excused and replaced, the question quoted above was asked in identical or similar form, or statements directed to the question, were made at least ten times before the following was presented to prospective juror Murphy:

> THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts? A-141.

---

2 The above is quoted from the state trial transcript. The question appearing in the opinion of the Eleventh Circuit, as reproduced in the appendix at A-127-128, is incomplete. See A-196.

Mr. Murphy replied: "Yes, I have." A-142.

The basis of federal jurisdiction in the court of first instance was a petition for writ of habeas corpus filed pursuant to Title 28 U.S.C. §2254.

REASONS FOR GRANTING THE WRIT

The best reason for granting review in this case is the predicate for the decision of the very court whose decision is sought to be reviewed.

After acknowledging the volume of cases in which the Witherspoon issue has been considered, the conflicting manner in which the issue is being decided, and the absence of direct guidance on the issue, the court concluded:

> The time thus seems appropriate to decide directly the standard that appellate courts should apply in reviewing Witherspoon exclusions. A-9.

With this pronouncement Petitioner

could not more heartily agree and while such a motive is laudable and such a standard does need to be articulated, it is submitted, however, that such a momentous endeavor should be undertaken only by this Court.

Recently, in a dissent from a denial of certiorari in Texas v. Mead, Case No. 83-791, (February 21, 1984), 34 CrL 4196, Justice Rehnquist, when considering the standard for review concerning a Witherspoon issue, stated:

> As a result of Witherspoon and these later cases, trial courts are faced with the difficult task of distinguishing between a veniremen so unalterably opposed to the death penalty as to be unable to apply the law impartially and one who, despite his objections, will conscientiously seek to apply the law in accordance with the facts developed at trial. We have mandated this inquiry; but we have failed to articulate any standard of review for alleged Witherspoon violations. We have failed to explain whether a trial court's determination that

> a given venireman may be excluded for cause under Witherspoon should be reversed only if, like other factual determinations, it is clearly erroneous or whether an appellate court must examine the transcript of the voir dire and draw its own conclusions, with no deference accorded the trial court's judgment.[3] The result, predictably, has been near chaos throughout the state and federal appellate courts. 34 CrL at 4197 (emphasis added; footnote omitted.)

After providing a sampling of twenty states indicating the varied methods devised to resolve Witherspoon issues, it was noted that the same degree of confusion and number of conflicting decision have carried over to the federal courts when considering appeals involving petitions for writs of habeas corpus under 28 U.S.C. §2254. Indeed, in addition to noting the Fifth Circuit Court of Appeals' three-way split on the issue, this very case was mentioned as representing one of two opposite results

within the Eleventh Circuit Court of Appeals. 34 CrL 4198, n.9.

In McCorquodale v. Balkcom, 721 F.2d 1493 (11th Cir. 1983) (en banc), the court considered as a necessarily included issue relating to Witherspoon, what degree of deference, if any, should be granted to a trial court's assessment of whether a juror's responses satisfied the Witherspoon requirement. At that point in time, the Eleventh Circuit was of the opinion that some deference should be afforded the trial court's assessment of the juror's demeanor and clarity of his answer. Id. at 1498. The court interpreted the Witherspoon standard as requiring the reviewing court to independently review the record to ensure that the exclusions were proper but that review must take into account that the trial judge was in a much better position to evaluate the clarity of a juror's response. Id.

When the court decided the instant cause, it once again made token reference to the notion of deference to lower court findings but extended the ostensible McCorquodale standard to the extreme by giving all respect and weight to the independent review aspect. Now, when reviewing Witherspoon issues, the appellate court not only can but must reach its own judgment on the question of whether a venireperson was improperly excused from a jury. A-15,16. The announcement of this standard quite obviously contemplates that absolutely no deference will be given to any court below, whether state or federal.

The above is but one instance of the troublesome nature of Witherspoon and the particular struggle the Eleventh Circuit has experienced with the concept. Another is reflected in the pending petition for writ of ceritorari in

Wainwright v. Witt, Case No. 83-1427. Examination of the petition and appendix therein shows that when the federal habeas court was considering the Witherspoon claim, in reliance on Sumner v. Mata, 449 U.S. 539 (1981), it determined that the state court's presumptively correct factual determination that the jurors were properly excluded should stand. Wainwright v. Witt, A-14. In reversing this determination, the Eleventh Circuit was silent on the question of whether either the state determination was factual or whether the finding of the federal district court was factual. Most importantly, nothing was mentioned about the deference the habeas court paid to the state court. Certainly none was paid by the court of appeals.

In contrast, in the instant cause, the federal district court, while not necessarily deferring to or adopting

the findings of the state court, nevertheless conclusively determined that there was no Witherspoon violation. A-205. This determination was not at all discussed by the court of appeals in terms of whether it was a finding of fact under FED.R.CIV.P. 52(a), and if so, whether clearly erroneous.

On a third occasion the Eleventh Circuit has wrestled with the due deference provision in 28 U.S.C. §2254(d) in Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983). Under consideration there was a state determination that the sentencing judge had not relied upon an impermissible factor when imposing sentence. Although the requirement of the statute was acknowledged, the court of appeals found that the finding was not fairly supported by the record.

This Court summarily reversed. Wainwright v. Goode, ___U.S.___, 104 S.Ct. 378 (1983). Insofar as the determination was

one of fact, the Court faulted the court of appeals for substituting its judgment for that of the Florida Supreme Court holding that either of two conclusions derived from an ambiguous record were fairly supported by that record.

From even these few examples, Petitioner finds it fairly easy to detect not only an inconsistent application of the deference requirement but also an alarming tendency to disregard it. In Goode, the requirement was neatly avoided using a basis of "no fair support." In Witt, it was simply ignored. In the instant cause, it was wholly abolished.[3] Put

3 One might notice with interest that two of the panel judges in Swint v. Pullman-Standard, 624 F.2d 525 (5th Cir 1980), are members of the Eleventh Circuit. In that case, the court literally ran roughshod over the general notion of deference in a manner termed "incredible", and based on a premise considered "infirm." Pullman-Standard v.Swint, infra, 102 S.Ct. at 1792.

another way, the Eleventh Circuit has an apparent willingness--perhaps a desire--to substitute its judgment for that of judicial officers. The next logical target could be trial juries.

Although this is a Witherspoon case, it is not so much a Witherspoon issue. The compelling question is what deference is to be paid to lower court findings. By announcing its standard as one eliminating any such deference, the Eleventh Circuit has presented what might be considered an additional link in the chain of cases represented by Sumner v. Mata, supra, Pullman-Standard v. Swint, 456 U.S. 273 (1982); Marshall v. Lonberger, ___U.S.___, 74 L.Ed-2d 646, 103 S.Ct. 843 (1983), and Maggio v. Fulford, ___U.S.___, 74 L.Ed.2d 796, 103 S.Ct. 2261 (1983). The directory principles clearly stated in these cases were ignored by the use of the "mixed question of law and fact" device

currently popular in the Eleventh Circuit. A-26, n.3. Compare Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), cert. granted, ___U.S. ___, 103 S.Ct. 2451 (1983).

The issue of whether a Witherspoon exclusion is a mixed question of law and fact likewise needs to be addressed. Admittedly, there is authority for the proposition that the question of juror impartiality is one mixed with law and fact. Irvin v. Dowd, 366 U.S. 717 (1961). Also, it is seen that Cuyler v. Sullivan, 446 U.S. 335 (1980), is being relied upon to buttress the conclusion that mixed questions are not subject to the operation of 28 U.S.C. §2254(d). See e.g., Hance v. Zant, 696 F.2d 940 (11th Cir. 1983); Yount v. Patton, 710 F.2d 956 (3d Cir. 1983), cert. granted, Patton v. Yount, ___U.S.___, 104 S.Ct. 272 (1983).

However, decisions of this Court

tend to raise the doubt that such a characterization of a Witherspoon exclusion is proper. For example, Irvin v. Dowd, supra, seems to be contradicted, or at least modified by Rushen v. Spain, Case No. 82-2083, (December 12, 1983), 34 CrL 4118. There the substance of an ex-parte communication and its effect on juror impartiality was considered to be only a question of historical fact. Accord, Smith v. Phillips, ___U.S.___, 102 S.Ct. 940 (1982).

In Marshall v. Lonberger, supra, it was held that although the question of whether a plea of guilty is voluntary for purposes of the federal Constitution is a question of federal law, it must be answered and is indeed framed in terms of historical fact.

The concept of mixed questions, though appropriate perhaps as initially envisioned, see Baumgartner v. United

States, 322 U.S. 665 (1944), has seemingly evolved into a semantic contraption serving only to fuel an already confusing situation. As noted above, the Eleventh Circuit considers the right to a fair trial to be determined as a mixed question of fact and law. However, it considers the due process right as it relates to voluntariness of confession to be determined solely as a matter of fact. Cox v. Montgomery, 718 F.2d 1036 (11th Cir. 1983), citing Jurek v. Estelle, cert. denied, 450 U.S. 1014 (1981). Whether a juror is properly excused under Witherspoon and whether a confession is voluntary appears to Petitioner to be analytically similar matters of fact which at least must determine matters of federal law, Marshall v. Lonberger, supra, and must be subject to some degree of §2254 application.

Assuming the court of appeals

correctly considered the questions as mixed or as the Court put it in Pullman-Standard v. Swint, supra, 102 S.Ct. 790, n. 19, a question of whether a rule of law as applied to the established facts was or was not violated, it is further submitted that the court decided the issues on the merits in clear conflict with the decisions of this Court. We support this position by examining the obvious source of the issue, Witherspoon, itself.

During the jury selection at the trial of William Witherspoon the trial court stated:

> 'Let's get these conscientious objectors out of the way, without wasting any time on them.' 391 U.S. at 514.

Of the forty-seven veniremen who were challenged for cause on the basis of their attitudes towards the death penalty, only five explicitly stated that under

no circumstances would they vote to impose capital punishment. Id. This resulted in a jury in that case, "... uncommonly willing to condemn a man to die..." Id. at 521. It was from footnote 21 to that decision that the so-called Witherspoon standard emerged.

In Boulden v. Holman, 394 U.S. 478 (1969), the Court found Witherspoon violations in eleven instances and quoted as representative one of the exchanges that took place:

> 'THE COURT: Do you have a fixed opinion against capital punishment?
>
> MR. SEIBERT: Yes, sir.' 394 U.S. at 483.

Two additional veniremen were challenged on the mere basis that they did not "believe in" capital punishment. The Court emphasized that the critical question in Witherspoon was not how the phrases employed have been construed by

courts and commentators, but rather what those phrases may have been understood to mean by prospective jurors. Using that standard the Court then alluded to two exchanges which it concluded was a sufficient showing that the veniremen involved would never be willing to impose the death penalty. After being asked, as were all the prospective jurors, whether they had a fixed opinion against capital punishment, the veniremen were asked the following:

> 'THE COURT: You think you would never be willing to inflict the death penalty in any type case?
>
> MR. NELSON: Yes, sir.
>
> * * *
>
> THE COURT: You mean you would never inflict the death penalty on [sic (by court)] any case?
>
> MR. MOON: That's right.'
> 394 U.S. at 483 n. 6

In Maxwell v. Bishop, 398 U.S. 262

(1970), the Court reviewed the jury selection for a trial which took place long before the decision in Witherspoon. The Court found violations in the following exchanges:

> 'Q. If you were convinced beyond a reasonable doubt at the end of this trial that the defendant was guilty and that his actions had been so shocking that they would merit the death penalty do you have any conscientious scruples about capital punishment that might prevent you from returning such a verdict?
>
> A. I think I do.
>
> * * *
>
> Q. Do you entertain any conscientious scruples about imposing the death penalty?
>
> A. Yes, I am afraid I do.
>
> * * *
>
> A. Mr. Adams, do you have any feeling concerning capital punishment that would prevent you or make you have any feelings about returning a death sentence if you felt beyond a reasonable doubt that the defendant was guilty and that

> his crime was so bad as to merit the death sentence?
>
> A. No, I don't believe in capital punishment.' (Emphasis supplied.)'
> 398 U.S. 264, 265 (emphasis in original; footnote omitted)

Clearly in the first instance the best that was revealed thereby was that a prospective juror thought his conscientious scruples might prevent him from imposing the death penalty. In the second instance, the prospective juror simply stated that he did not believe in capital punishment, much like the situation found in Boulden, supra, n. 7.

In Wigglesworth v. Ohio, 403 U.S. 947 (1971), Witherspoon violations were found to have occurred due to the procedure employed by the trial court of asking each prospective juror whether he or she had any opposition to capital punishment. As the prospective juror replied yes, he or she was excused summarily.

See State v. Wigglesworth, 248 N.E.2d 607 (Ohio 1969).

In Harris v. Texas, 403 U.S. 947 (1971), that which constituted Witherspoon violations was a series of statutory questions relating to several veniremen dealing only generally with conscientious scruples and beliefs regarding capital punishment. Notably absent was a specific objection to capital punishment regardless of what the evidence may have shown. See Harris v. State, 457 S.W.2d 903 (Tex.App. 1970).

In Adams v. Washington, 403 U.S. 947 (1971), there is found ambiguous and vague answers on the part of the prospective jurors. Two of the prospective jurors discussed in the state decision were not sure how they felt and a third would have considered the imposition of the death penalty "very difficult." See State v. Adams, 458 P.2d 558 (Wash.

1969).

Davis v. Georgia, 429 U.S. 122 (1976), reversed the Georgia Supreme Court which, although finding a Witherspoon violation, nevertheless affirmed the conviction and death sentence on the theory that the exclusion did not represent a systematic and intentional attempt to deny the defendant a jury representing a cross-section of the community.

In Lockett v. Ohio, 438 U.S. 586 (1978), the venire was asked whether any of them were so opposed to capital punishment that they could not listen to the evidence and the law and make their determination solely upon the evidence and the law without considering capital punishment. Four of the venire responded affirmatively. The trial judge then addressed the following question to those veniremen:

'[D]o you feel that you

> could take an oath to well and truely [sic (by the court)] try this case . . . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment.' 438 U.S. at 596, 597.

This exchange, in the opinion of the Court, represented one sufficient to show that the excused jurors had made it unmistakably clear that they would neither abide by existing law nor follow conscientiously the instructions of the trial judge. In short, no Witherspoon violation was found to exist.

In Maggio v. Williams, ___U.S.___, 104 S.Ct. 311 (1983), the court granted Louisiana's motion to vacate a stay of execution entered by the Fifth Circuit Court of Appeals and in so doing discussed the grounds Williams raised in his pending petition for certiorari. One such ground was based on a Wither-

spoon claim which had been raised and rejected by the Fifth Circuit and presented to this Court in previous petitions for writs of certiorari. Addressing this claim and others, the Court stated that the arguments based thereon were no more persuasive now than they were the first time they were rejected. 104 S.Ct. at 311.[4]

If we adhere to the notion that the critical issue in Witherspoon is how the prospective juror understands what is being asked of him, then it is at once easy to determine, based on the exchanges in the instant cause, that the Eleventh Circuit decided the merits of the claim in a way contrary to the pronouncements

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4 The colloquies involved in the trial of Williams are found in Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982), (en banc).

of this Court on the issue. Put another way, if this Court were to review the exchanges here, based on its consistent line of previous cases, there can be no doubt that an opposite conclusion would be reached.

As long as the states provide for capital punishment there will arise the question of excluding prospective jurors under Witherspoon v. Illinois, supra. As long as capital punishment is imposed in those cases, an issue directed to whether that exclusion was proper will always be raised. Be that as it may, both the issues of whether Witherspoon determinations are ones of fact or law, or both, and the manner of review of those determinations by federal courts virtually demand authoritative direction and resolution from this Court.

While the decision sought to be reviewed may have been intended to be

a starting point for cases within the Eleventh Circuit, it nevertheless represents not only another example of confusion and conflict but also an erroneous interpretation of the law. The court of appeals has provided the ideal vehicle through which this Court can settle the important questions of federal law and end the conflict which appears to be growing ever greater.

CONCLUSION

For nearly sixteen years the states have endeavored to afford the right announced in Witherspoon to capital defendants. During that period, federal courts, although consistently being given the "what" of Witherspoon, have never been provided the "how". We respectfully suggest that now is the time and request that this case serve as the medium.

We ask the Court to grant the petition and review the decision of the court of appeals.

Respectfully submitted on this _____day of March, 1984.

Richard W. Prospect
Assistant Attorney General

APPENDIX

IN THE UNITED STATE COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-5590

WILLIE JASPER DARDEN,

Petitioner-Appellant,
Cross-Respondent,

v.

LOUIE L. WAINWRIGHT, Secretary Department of Corrections, State of Florida,

Respondent-Appellee,
Cross-Petitioner,

Appeals from the United States District Court for the Middle District of Florida

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(February 22, 1984)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON, and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.*

*Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision pursuant to 28 U.S.C. §46(c).

JOHNSON, Circuit Judge:

Willie Jasper Darden appeals the denial by the district court of his habeas corpus petition, challenging the constitutionality of his conviction and death sentence.

As grounds for relief, petitioner claims that he was denied effective assistance of counsel, that the prosecutors' closing arguments to the jury denied him a fair trial, and that venirepersons were improperly excluded from the jury in violation of the rule of Witherspoon v. Illinois. This Court sitting en banc has twice considered issues raised by this appeal and has concluded on the basis of the Supreme Court's uniform and consistent application of the rule in Witherspoon that the district court's denial of habeas relief must be reversed.

Darden was charged with first de-

gree murder, robbery and assault with intent to commit murder in the first degree based upon events occurring at Carl's Furniture Store in Lakeland, Florida, on September 8, 1973.[1] The jury found Darden guilty on all three counts and recommended the penalty of death. The trial court concurred with the jury's recommendation and imposed the death sentence.

Darden's conviction and sentence were affirmed by the Florida Supreme Court in Darden v. State, 329 So.2d 287 (1976). The United States Supreme Court initially granted Darden's petition for writ of certiorari, 429 U.S. 917, but later dismissed the writ as improvidently granted, 430 U.S. 704.

After the Governor of Florida signed a warrant for Darden's execution, Darden filed a petition for habeas relief in the United States District

Court for the Middle District of Florida, raising the issues presented in this appeal. The court entered a stay of execution and assigned the case to a magistrate who, after a hearing on the ineffective assistance of counsel claim, recommended that the district court granted the habeas petition on the basis of Darden's claims of prosecutorial misconduct during closing argument and improper jury excusal. The district court rejected the magistrate's recommendation and denied habeas relief. Darden timely noticed this appeal.

I. THE WITHERSPOON ISSUE

The Legal Standard. During the jury qualification and selection procedure, the trial court excused for cause several venirepersons who expressed opposition to the death penalty. Petitioner argues that two of these dismissals were errors of constitutional

magnitude under the standard established by the Supreme Court in Witherspoon v. Illinois, 391 U.S. 510 (1968).

In Witherspoon, the Supreme Court held that a death sentence "cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Id. at 522 (footnote omitted). Witherspoon recognized that a jury purged of all those who expressed religious or conscientious scruples against capital punishment was not the impartial jury promised by the Sixth and Fourteenth Amendments; it was instead "a jury uncommonly willing to condemn a man to die." Id. at 421. The Court at the same time recognized the necessity of excusing jurors whose intractable opposi-

tion to capital punishment would distort their judgment on the facts developed in the case before them and would frustrate the state's legitimate efforts to implement an otherwise constitutional death penalty scheme. The Court thus fashioned the rule that prospective jurors cannot be excused from jury service on the basis of their opposition to the death penalty unless they make it

> unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Id. at 522 n.21 (emphasis in original).

This Circuit strictly adheres to the mandates of Witherspoon, Granviel v. Estelle, 655 F.2d 673, 677 (5th Cir. 1981), cert. denied, 455 U.S. 1003

(1982),[2] which we understand to require that

> [o]nly the most extreme and compelling prejudice against the death penalty, perhaps only or very nearly a resolve to vote against it blindly and in all circumstances, is caused to exclude a juror on Witherspoon grounds.

Burns v. Estelle, 592 F.2d 1297, 1300 (5th Cir. 1979), adhered to en banc, 626 F.2d 396 (1980).

Witherspoon sets a strict legal standard and imposes as well a very high standard of proof. The venireperson must make it "unmistakably clear" that he or she will automatically vote against the death penalty. 391 U.S. at 522 n.21. "Unless a venireman states unambiguously that he would automatically vote against imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is

his position." Id. at 515-16 n.9. Thus, any ambiguity must be resolved by not excluding the venireperson from the jury.

The Standard of Appellate Review. Application of the Witherspoon rule and its standard of proof has generated a plethora of cases in which appellate courts have closely reviewed trial courts' voir dire examinations of prospective jurors to determine whether those excluded made unmistakably clear their rigid resolve to oppose the death penalty. In these many cases, no court has explicitly determined the standard that should govern appellate review. Courts instead have proceeded without discussion to review independently the transcript of the voir dire questioning and to determine whether the constitutional standards articulated in Witherspoon were met. The question of the appropriate standard of review recently

has come to the fore with some suggestion that Witherspoon review should accord greater deference to the decision reached by the trial judge. See O'Bryan v. Estelle, 714 F.2d 365, 391-96 (5th Cir. 1983) (Higginbotham, J., concurring specially); id. at 400-12 (Buchmeyer, J., dissenting); Alderman v. Austin, 695 F.2d 124, 128-34 (5th Cir. Unit B 1983)(en banc (Fay & Roney, JJ., dissenting). The time thus seems appropriate to decide directly the standard that appellate courts should apply in reviewing Witherspoon exclusions.

Although no court previously has explicitly decided the proper standard of review in Witherspoon cases, the manner in which appellate courts, including the Surpeme Court, have conducted the many reviews that they have made of Witherspoon decisions provides guidance for this Court's decision. The predominant

if not exclusive method of review undertaken by the federal courts, whether on direct review or in habeas proceedings, has been an independent review, based upon a close study of the voir dire transcript to determine whether a venireperson was improperly excluded from the jury. See, e.g., Adams v. Texas, 448 U.S. 38, 49-51 (1980); Lockett v. Ohio, 438 U.S. 586, 595-97 (1978); Maxwell v. Bishop, 398 U.S. 262, 264-65 (1970); Boulden v. Holman, 394 U.S. 478, 482-84 (1969); Spencer v Zant, 715 F.2d 1562, 1576-77 (11th Cir. 1983); King v. Strickland , 714 F.2d 1481, 1492-93 (11th Cir. 1983); Witt v. Wainwright, 714 F.2d 1069, 1080-83 (11th Cir. 1983); Hance v Zant, 696 F.2d 940, 954-56 (11th Cir. 1983); Bell v. Watkins, 692 F.2d 999, 1006-08 (5th Cir. 1982); Williams v. Maggio, 679 F.2d 381, 383-86 (5th Cir. 1982) (en banc), cert. denied, ___U.S.___,

103 S.Ct. 3553 (1983); Alderman v. Austin, 663 F.2d 558, 562-64 (5th Cir. Unit B 1982), aff'd in relevant part, 695 F.2d 124 (1983) (en banc); Granviel v. Estelle, 655 F.2d 673, 677-78 (5th Cir. 1981), cert.denied, 455 U.S. 1003 (1982); Burns v. Estelle, 592 F.2d 1297, 1300-01 (5th Cir. 1979), adhered to en banc, 626 F.2d 396, 397-98 (1980).

The approach taken by the courts is consistent with the demands of the law. Application of the Witherspoon rule involves a mixed question of law and fact, which makes it a determination subject to independant review by an appellate court. See Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980); Irvin v. Dowd, 366 U.S. 717, 723 (1961); Brown v. Allen, 344 U.S. 443, 507 (1953) (Frankfurter, J.); Hance v. Zant, 677 F.2d 792, 798 (11th Cir. 1982); see also Pullman-Standard v. Swint, 456 U.S. 273,

289-90 n.19 (1982) (citing Supreme Court authority for independent appellate court review of mixed questions of law and fact).

Mixed questions of law and fact involve "'the application of legal principles to the historical facts of [the] case.'" Hance, supra, 696 F.2d at 947 (quoting Cuyler, supra, 446 U.S. at 342). "'Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts...the [federal] Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.'" Id. (quoting Brown v. Allen, 344 U.S. 443, 507 (1953) (Frankfurter,

J.)).

The trial judge during voir dire questioning must apply the Witherspoon legal standard to the venireperson's responses. He or she must interpret the legal significance of the answers given. The answers alone do not dispose of the issue; the judge must decide whether the responses make unmistakably clear the prospective juror's unbending opposition to capital punishment. Because the trial court undertakes this application of law to fact, the court on appeal must independently review the colloquy preserved in the voir dire transcript to determine whether the trial court correctly applied the constitutional standard to the statements made.[3]

While the appellate court clearly bears the responsibility to review independently the mixed question of fact

and law involved in a Witherspoon determination and ultimately to decide whether Witherspoon's requirements were met, that responsbiility does not preclude the court on appeal from according deference to the decision of the trial judge who had an opportunity to hear the venirepersons' responses and observe their demeanor. See McCorquodale v. Balkcom, MS at 9 (11th Cir. 1983) (en banc); see also O'Bryan v. Estelle, 714 F.2d 365, 393-96 (5th Cir. 1983) (Higginbotham, J., specially concurring) (independent appellate review to determine whether trial court abused its discretion). Review of the Witherspoon questions posed to the veniremembers, because it involves only a determination whether the trial court employed the proper legal standard, remains always a matter exclusively for the court on appeal. Appellate review of the venire-

persons' responses to those questions, however, because it involves a determination of the intended meaning of the responses given, as well as application of the appropriate legal standard, may benefit by consideration of the trial judge's interpretation. The court on appeal, thus, should grant deference to the trial judge's assessment of the venirepersons' responses, including the venirepersons' demeanor and the clarity of the venirepersons' responses, to questions posed. However, the prescribed independent appellate review of mixed questions of fact and law and Witherspoon's strict rule that venirepersons make unmistakably clear their automatic opposition to capital punishment ultimately require an appellate court to reach its own judgment on the question whether a venireperson was im-

properly excluded from a jury. See McCorquodale, supra, at 9.

Application of the Standard. Darden challenges the excusal for cause of venirepersons Varney and Murphy. He maintains that their responses to voir dire questions failed to make unmistakably clear their unbending opposition to capital punishment.

Improper exclusion of even one venireperson is a sufficient basis for granting the habeas petition in this case. See Davis v. Georgia, 429 U.S. 122, 123 (1976); Witt v. Wainwright, 714 F.2d 1069, 1081 & n.8 (11th Cir. 1983). Careful review of the voir dire transcript in this case reveals that venireperson Murphy was excused in violation of the Witherspoon principles. We therefore find it unnecessary to consider whether venireperson Varney also was improperly excused.

Only one question purporting to relate to the Witherspoon principles was asked of venireperson Murphy.

THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?

MR. MURPHY: Yes, I have.

THE COURT: All right, sir, you will be excused then.

Record at 165 (emphasis added).

The court in this instance applied the wrong legal standard.[4] The question in a Witherspoon inquiry is not whether prospective jurors could vote for the death penalty without violating their principles, but whether, if they have principles against capital punishment, they could put them aside and vote for the death penalty when the law and the

facts of the case require it. Witherspoon and its progeny explicitly recognized that some jurors, notwithstanding their opposition to capital punishment, would be willing to return a verdict of death, making their scruples subservient to their duty as jurors. Adams v. Texas, 448 U.S 38, 44-45 (1980); Boulden v. Holman, 394 U.S. 478, 483-84 (1969); Witherspoon v. Illinois, 391 U.S. 510, 515-16 n.9 (1968).

The government argues that the question asked of Mr. Murphy and Mr. Murphy's response must be read in light of the trial court's earlier correct statement of the Witherspoon issue. If the question directed to the venireman was imperfect, the government maintains that the prior correct statement of the issue cures any Witherspoon error.

In determining whether a prospective juror was properly excluded, the

court considers the entire voir dire to place in proper context the venireperson's response. Witt v. Wainwright, 417 F.2d 1069, 1083 (11th Cir. 1983); King v. Strickland, 714 F.2d 1481, 1492-93 (11th Cir. 1983). Just as the Court "does not require that the venireperson utter a pat phrase, the incantation of which magically frees the power of excusal from its yoke of unconstitutionality." Witt, supra, 714 F.2d at 1083, so the Court will review the "totality of the circumstances of the voir dire," id., to determine whether the trial court correctly posed the Witherspoon questions to the venireperson who was excused.

In the trial of this case, the judge at the start of the voir dire called twelve venirepersons into the jury box, the judge then stated:

THE COURT: Now I am going to ask

> each of you individually the same question so listen to me carefully, I want to know if any of you have such strong religious, moral or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts presented to you should be such as under the law would require that recommendation? Do you understand my question?

Record at 43.

At the time that this statement was made, Mr. Murphy was not among those seated in the jury box. The statement thus was not even addressed to him. Later in the voir dire -- one hundred and twenty-two pages later in the voir dire transcript -- Murphy was seated in the jury box, and the improper question was posed to him. In view of this Court's strict adherence to the requirements of Wither-

spoon, Granviel v. Estelle, 655 F.2d 673, 677 (5th Cir. 1981), cert. denied, 455 U.S. 1003 (1982), and the strict requirements of Witherspoon itself, we cannot assume that Mr. Murphy heard the correct articulation of the Witherspoon standard of that, if he heard it, he remembered it and knew it to be the correct statement of the question when he was later questioned incorrectly.[6]

Witherspoon makes clear that death sentences cannot stand in cases in which venirepersons were excluded on any broader basis than that established by the Witherspoon opinion. 391 U.S. at 521-22 n.21. This firm rule requires that we grant the habeas petition in this case.

The decision to recommend a sentence of death places upon a jury a most awesome responsibility.

The trial judge bears the ultimate responsibility to provide each defendant a fair trial and an impartial jury, and the selection of the men and women who serve on the jury in a capital case requires great diligence. Inquiry, on voir dire, as to the prospective jurors' views on the death penalty is a critical inquiry. Improper Witherspoon questioning can lead to the unconstitutional exclusion of jurors whose reservations about the death penalty do not disqualify them from service. Should any be so excluded, the death penalty cannot, constitutionally, be imposed, no matter what the evidence may show, for their exclusion denies the defendant an impartial jury and produces instead a jury that is "uncommonly willing to condemn a man to die." Witherspoon v. Illinois, 391 U.S. 510, 521 (1968).

The Witherspoon rule, though

articulated over 15 years ago and applied many times by many courts over the course of its life, all too frequently forms the basis for a reversal of a death sentence. State trial courts and federal district courts must exercise greater care to ensure that the Supreme Court's requirements are ment. Only a procedure that employs precise questions -- questions that clearly pose the two-fold Witherspoon inquiry set out in footnote 21 of the Supreme Court's opinion -- and that elicits unmistakably clear answers from each venireperson can satisfy the Court's strict standard.

II. THE PROSECUTORIAL MISCONDUCT AND INEFFECTIVE ASSISTANCE OF COUNSEL ISSUES

Petitioner also appeals the district court's denial of his request for habeas corpus relief based on his claim of prosecutorial misconduct in the state's closing argument to the jury and his

assertion of ineffective assistance of counsel. The en banc court concludes that the panel's evaluation of these issues was correct and reinstates the relevant portion of the panel's opinion, 699 F.2d at 1033-37.

III. CONCLUSION

The district court's denial of the writ of habeas corpus on the basis of its determination under Witherspoon is reversed. The State shall be prohibited from carrying out the sentence in this case unless the petitioner is afforded a new sentencing hearing within a reasonable time to be fixed by the district court. The district court's denial of habeas relief on the basis of its review of petitioner's claims of prosecutorial misconduct and ineffective assistance of counsel is affirmed. The case is remanded for proceedings not inconsistent with this opinion.

REVERSED in part; AFFIRMED in part;
REMANDED.

[1] The historical facts are set out in greater detail in Darden v. Wainwright, 513 F. Supp. 947 (M.D.Fla. 1981), and Darden v. State, 329 So.2d 287 (Fla. 1976).

[2] The Eleventh Circuit Court of Appeals has adopted the case law of the former Fifth Circuit handed down as of September 30, 1981, as its governing body of precedent, which is binding unless and until overruled or modified by this Court en banc. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[3] The trial judge's Witherspoon exclusion decisions thus are not subject to 28 U.S.C.A. § 2254(d), which provides in federal habeas cases a presumption of correctness to the written findings of fact made by the state trial judge after a hearing on the merits of a factual issue. Mixed questions of law and fact are not subject to this statutory presumption. Hance v. Zant, 696 F.2d 940, 946 (11th Cir. 1983) (citing Cuyler v Sullivan, 446 U.S. 335, 341-42 (1980).

[4] The trial court's misunderstanding of the Witherspoon issue is evident at another point in the record. At a conference in chambers with the attorneys and defendant present, the judge said:

> It is my ruling if a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief [sic] he would be unwilling to recommend a death penalty,

even though the facts and circumstances meet the requirements of law, then he in effect has said that he would be unwilling to follow the law the court shall charge upon it and disregard and be unwilling to follow it or if he did follow it, it would be going against his principles, and, therefore, I would rule that would be disqualification. If that exists, I intend to disqualify for cause.

Record at 18.

5 Record at 30-32.

6 Nor can the government find a cure in the Witherspoon question posed to Mr. Staha, the venireperson who was questioned immediately before Mr. Murphy. Mr. Staha was asked:

THE COURT: Do you have any principles in opposition to the death penalty that are so strong that it would make it impossible or very difficult for you to vote to recommend a verdict of a death sentence regardless of what the facts might be?

Record at 160 (emphasis added). This is an incorrect articulation of the Witherspoon question because it assumes that

a venireperson should be excused if it is only "very difficult" for him or her to vote to recommend death. See Adams v. Texas, 448 U.S. 38, 50 (1980)(" [N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever [of the death penalty on one's deliberations as a juror] is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty.").

HILL, Circuit Judge, concurring specially:

I concur in the result announced for the court by Judge Johnson.

I concur only because, on this record, Mr. Murphy was disqualified from serving as a juror but it had not been clearly shown that he would automatically vote against the imposition of capital punishment regardless of the evidence. Witherspoon v. Illinois, 391 U.S. 522 (1967). I agree with all that Judge Fay says touching upon the peculiar position occupied by a trial judge enabling him or her best to evaluate the venireperson's responses to Witherspoon questions. I do not find it remarkably different from what is said by Judge Johnson. Perhaps I should be inclined to show more deference to the finding of the trial judge than either. A conscientious trial judge must be bent upon

determining if a prospective juror has such a mind set that he or she would refuse to vote for the death penalty regardless of the evidence in the case. That is fact-finding. "The state of a man's mind is as much a fact as the state of his digestion." Eddington v. Fitzmaurice, 29 Ch. 459, 483 (1885) (Bowen, L.J.).

Yet the record must contain sufficient evidence to justify a finding of fact that a venireperson was of such a mind set that he or she was, under the law, disqualified, or the finding cannot be said to be supported. In Mr. Murphy's case, there was not sufficient evidence. He was clearly shown to be a person who could not vote in favor of capital punishment without violating his principles. He was not asked (so he never said) whether or not, if the evidence were sufficiently strong and the cir-

cumstances sufficiently aggravating , he could nevertheless vote to recommend the death penalty.

Judge Fay recounts for us the painstaking and conscientious efforts of Judge Dewell to adhere to the teachings of Witherspoon in the voir dire proceedings.[1/] It seems clear that Mr. Murphy heard and, no doubt, understood what had been asked of those who had been examined before him. One must assume that he fully expected to be asked, after he had acknowledged his principled opposition to the death penalty, whether or not he could nevertheless vote in favor of it if the evidence in the case indicated it to be appropriate under the

1/ Fully acknowledging the flaw Judge Johnson has detected, see supra note 4 and accompanying text (Slip Op. at 10) it seems clear to me that Judge Dewell understood and made diligent effort to apply Witherspoon in these proceedings.

law. For aught appearing, he may have felt compelled under his oath to say that he could. Until it appeared that he was not disqualified. Applying the teachings of Davis v. Georgia, 429 U.S. 122 (1976), the writ must issue, conditioned upon resentencing.

I find nothing in this record to indicate that the jury which convicted and recommended sentence for Darden was one "uncommonly willing to condemn a man to die." Judge Fay gives us a glimpse of Darden's crimes. We do not fix sentences; we merely pass upon contentions that the proceedings leading to the sentence were constitutionally flawed. Witherspoon and Davis require me to conclude that the disqualification of Mr. Murphy was such a flaw.

For this reason, I concur in the judgment.

TJOFLAT, Circuit Judge, dissenting:

The court today violates the Supreme Court's "total exhaustion" rule of Rose v. Lundy, 455 U.S. 508, 102 S.Ct. 1191 (1982), by entertaining the merits of a habeas corpus petition that presents both exhausted and unexhausted claims. I therefore dissent.

I.

28 U.S.C. §§ 2254(b) and (c) (1976) states:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by

> any available procedure, the question presented. (emphasis added).

In Galtieri v. Wainwright, this court held, en banc, that "a federal district court must dismiss without prejudice a 'mixed' petition for a writ of habeas corpus [i.e., one containing both exhausted and unexhausted claims] filed by a state prisoner"[1] and that state habeas corpus "petitioners must present all their claims to the state court system before turning to the federal courts"[2] The Supreme Court subsequently held in Rose v. Lundy, that federal district courts must dismiss mixed petitions summarily,[3] and that federal courts of appeals may not review any claims that have been presented in a mixed petition to the district court.

The district court in this case was bound by the statute and our holding in Galtieri.[4] Nevertheless, the dis-

trict court entertained, on the merits, a twenty-six count petition containing a plethora of unexhausted claims.[5] See infra at 3-4. The panel that initially considered this appeal was precluded by Rose and the statute from considering the merits of any of petitioner's claims. Like the district court, the panel ignored its clear duty to dismiss the petition for want of exhaustion. Today the court, sitting en banc, repeats this error.

II.

The record shows that, after his trial, petitioner unsuccessfully brought eight claims of error on direct appeal to the Florida Supreme Court,[6] and three claims on collateral attack.[7] The Florida Supreme Court's opinions disposing of these appeals do not indicate whether petitioner presented these claims of error under the federal Constitution or

state law.[8] In any event, the Florida Supreme Court rejected these claims.

On May 21, 1979, petitioner commenced these habeas corpus proceedings in the district court. His petition contained two federal constitutional claims: (1) prosecutorial misconduct and (2) improper pretrial identification. The State answered his petition on May 22, and conceded that these two claims had been exhausted. On July 5 the State moved the court for leave to propound interrogatories to petitioner, indicating that in order to avoid abuse of the writ problems "now is the proper time to fully litigate and resolve all justiciable issues . . . petitioner would be well advised to present all claims at this time . . . ."[9] Petitioner answered the interrogatories and amended his petition to add an ineffective assistance of counsel claim under the sixth

and fourteenth amendments. On September 7 petitioner supplemented his answer to the State's interrogatories, listing twenty-three additional federal constitutional claims, for a total of twenty-six.[10] The parties then stipulated on September 14 that the twenty-three additional claims should be included in petitioner's habeas petition. On the same day the magistrate to whom the district court had referred the case entered an order noting that "[t]he Petitioner has added additional claims for habeas corpus relief without objections of the [State], and [the State] has waived any claim that Petitioner has failed to exhaust state court remedies as to any claims presented." The State then answered these claims on the merits. The magistrate, and subsequently the district court, addressed each of petitioner's claims on the merits.

Assuming that the eleven claims petitioner presented to the Florida Supreme Court on direct appeal and on collateral attack were claims of federal constitutional error,[11] petitioner raised three types of claims in the district court: claims presented on the merits to the state courts and exhausted;[12] claims not presented to the state courts but--becuase of some sort of procedural abandonment--no adequate state remedy remained;[13] and claims not presented to the state courts for which state court adjudication on the merits remained available.[14] The district court could properly entertain the first and second categories of petitioner's claims if they were all the petition contained. 28 U.S.C. § 2254(b) (1976). The petition, however, contained claims from the third category. These claims, at least nine in number, were exhausted

and would have presented a justiciable controversy in the state courts. The petition was thus a "mixed" one. Anything but a summary dismissal of a mixed petition disregards Rose v. Lundy, the statute, and the compelling policy arguments behind the statute. This Court has placed itself in the same posture as the Sixth Circuit, which was reversed in Rose v. Lundy.

III.

The plain words of sections 2254(b) and (c) and Rose v. Lundy forbid the entertainment of petitioner's appeal on the merits. See discussion infra text at 19-23. Moreover, the express language of the statute and Rose leave no room for a state attorney general's waiver of exhaustion. But see Thompson v. Wainwright, 714 F.2d 1497 (11th Cir. 1983). See discussion infra text at 11-18. It is true that the drafters of the statute and the

authors of Rose, and Galtieri, did not expressly consider whether a state attorney general could waive the exhaustion requirement found in sections 2254(b) and (c); the policy reasons behind the exhaustion rule preclude such a waiver, however, and require us to dismiss the petition.

Exhaustion in state prisoner habeas proceedings was developed a century ago as a consideration of comity, an equitable notion that federal courts hearing state prisoner claims should exercise discretion

> in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution.

Ex parte Royall, 117 U.S. 241, 251, 6 S.Ct. 734 (1886). The courts later refined this concept into the rule that

state remedies must be exhausted except in certain limited circumstances. See Rose, 455 U.S. at 515, 102 S.Ct. at 1202 (citing cases). In 1948, Congress codified this rule in 28 U.S.C. § 2254. The exhaustion rule found in sections 2254(b) and (c), based on notions of comity, places limitations on the federal courts' exercise of habeas corpus jurisdiction. It states:

> (b) An application for a writ . . . shall not be granted unless it appears that the applicant has exhausted . . . .
>
> (c) An applicant shall not be deemed to have exhausted . . . if he has the right under the law of the State to raise, by any available procedure, the question presented. (emphasis added).

These limitations are cast in mandatory, obligatory language. Following a total exhaustion rule does more than further notions of comity, it complies with the dictates of Congress.

Congress codified the exhaustion rule because of the advantages it presents in managing our dual court systems. Exhaustion of state remedies furthers federalism by maintaining the delineation between federal and state court systems and ensuring federal respect for state courts. Comity has been defined as giving proper deference to states,[15] but comity in a federal system cuts both ways; the states may not impose on the federal courts the primary task of reviewing its criminal convictions. The exhaustion rule furthers the efficient working of both federal and state courts.

A. The Exhaustion Rule and State Courts

The strict exhaustion rule defined by Rose v. Lundy furthers a number of interests of the state court systems. First, it pays great respect to state courts, recognizing the integrity of the

state court system and its need to assure a complete disposal of each case presentable to it. State judges, just like federal judges, are sworn to uphold the Constitution. The exhaustion rule recognizes this fact by permitting the state system to be the first to adjudicate on the merits each claim a petitioner may later seek to bring into federal court.

Second, exhaustion ensures that state courts may entertain and decide constitutional claims without interference by federal district courts.[16] See Duckworth v. Serrano, 454 U.S. 1, 2, 102 S.Ct. 18, 19 (1981) (per curiam) (exhaustion requirement "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights"). As the Supreme Court stated in Engle v. Isaac, 456 U.S. 107, 128, 102

S.Ct. 1558, 1571 (1982), "[t]he States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good faith efforts to honor constitutional rights." Cf. Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971) (federal court must normally abstain from deciding issues implicated in ongoing criminal proceedings in state court.).

Third, exhaustion enables state courts to address the prisoner's claims in light of state evidentiary, procedural, and substantive law. This permits the courts to ensure a uniform and accurate application of state law, which in many instances may remove the federal constitutional claims altogether. Even where

state law is not dispositive of the case, it is still preferable for the state courts to act first. This enables them to become increasingly familiar with and hospitable toward federal constitutional issues.[17] The need for state court familiarity with federal constitutional principles has grown especially acute given the marked development of criminal procedural rules in recent times.[18]

Finally, the total exhaustion required by Rose v. Lundy enhances the possibility that the state court will satisfactorily resolve the petitioner's constitutional claims and bring his criminal case to a close. Such finality not only preserves the dignity of state courts, but aids deterrence and assists rehabilitation. See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 146 (1970); Bator, Finality in Criminal Law

and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 444-62 (1963). It also reduces some of the "significant costs" of the Great Writ.[19]

B. The Exhaustion Rule and Federal Courts

Federalism is a two-way street. The concepts of comity and federalism behind the exhaustion rule benefit federal courts as well as state courts.[20] The rule requires a petitioner first to flush out all of his claims in state court, either on direct appeal or collateral attack. Collateral attacks usually occur relatively close in time to the trial;[21] memories are sharper, and witnesses and evidence are more likely to be available. Thus by the time a petitioner's constitutional claims reach federal court, the historical facts that underpin his claims should have been ascertained. Accord, Rose, 445 U.S. at 519, 102 S.Ct. at 1203-04. The state

court's findings of fact are so unimportant to the federal courts that they will be presumed correct, and may well avoid the need for an evidentiary hearing in the district court. 28 U.S.C. § 2254(d) (1976). This is precisely the opposite of what happened in the case before us. The state courts had no chance to develop the facts that gave rise to many of petitioner's claims because these claims did not materialize until petitioner arrived in federal court.

The federal courts also benefit from state court treatment of federal constitutional claims in their established factual setting. Such treatment obviously reduces the potential for erroneous decision making at the federal level, and thus improves the quality of justice.[22]

The total exhaustion of a petitioner's claims should lessen the number of his claims that reach the district court.

State courts will ferret out and identify the patently meritless claims. Some federal constitutional claims will be decided on the merits for petitioner and thereby precluded from habeas corpus review. Still others will be decided for the petitioner upon adequate state law grounds. In this last instance, the result of strict exhaustion is akin to Pullman abstention,[23] which enables a federal court to avoid the constitutional adjudication of the validity of state law if the law can be read by the state courts to eliminate the constitutional question from the case.

The total exhaustion rule of Rose aids the district courts because it is far easier and more efficient to administer than a rule, such as the one promulgated by Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983), and Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983), which authorizes a district court to entertain

a mixed petition whenever the State waives the exhaustion requirement and the court is inclined to hear the merits of the petitioner's claims. See infra text at 12-20. First, the total exhaustion rule is easy for habeas petitioners to follow. As the Court stated in Rose: "§ 2254(b), (c) [provides] a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." 455 U.S. at 520, ____ S.Ct. at_____(emphasis added). The rule also provides a clear instruction to magistrates and district court judges: Mixed habeas petitions must be dismissed summarily. See id. at 520, ___S.Ct___ (requiring "strict enforcement of the exhaustion requirement"); id. at 527 ____S.Ct.____(Blackmun, J., concurring in judgment) (interpreting majority to hold that district court must dismiss entire

petition); see also Galtieri, 582 F.2d at 355-56. As Justice Brennan stated in his partial concurrence in Rose, "the exhaustion requirement of 28 U.S.C. §§ 2254 (b), (c) obliges a federal district court to dismiss, without consideration on the merits, a habeas corpus petition from a state prisoner when that petition contains claims that have not been exhausted in the state courts . . . ."[24]

This simple, clear, and unyielding rule, when combined with habeas rule 9,[25] means that in the great majority of cases a petitioner must swiftly bring all his claims to the district court in one petition, and all the claims must be exhausted. Galtieri, 582 F.2d at 356-258. These claims, presented first in state court, are likely to be well focused and developed, and the district court can swiftly and accurately adjudicate all constitutional issues. As the Rose Court

said, "[r]ather than increasing the burden on federal courts, strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition."[26] A rigorously enforced exhaustion requirement, when combined with habeas rule 9, will reduce piecemeal litigation, and "both the courts and the prisoners should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review."[27] As the en banc court said in Galtieri, "[c]onsiderations of comity,[28] avoidance of piecemeal litigation, economy of judicial energy, and the fullest consideration of a petitioner's claims are best served if all of a petitioner's claims are presented to the state court system at one

time." 582 F.2d at 356.

C. Waiver of Exhaustion

Two recent decisions of this court have placed the eleventh circuit among the minority of federal judicial circuits that permit the district court or the court of appeals to entertain on the merits a mixed petition whenever the State's counsel (usually the attorney general) explicitly waives the petitioner's failure to exhaust all of his claims. Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983); Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983).[29] With due respect to the panels in those cases, their holdings were plainly foreclosed by Rose v. Lundy. Today's case presents this court with an opportunity to set aside those holdings and bring this circuit into compliance with the law.

Thompson held that a district court could, in its discretion, accept or reject the State's waiver of exhaustion.

Thompson relied in part on Westbrook; it also cited a number of our cases, including prior fifth circuit opinions, in which we considered mixed petitions on the strength of the State's explicit or implicit waiver of exhaustion. 714 F.2d at 1501. The Thompson court, in particular, proceeded on the assumption that Rose had not decided the waiver question and was reasoned that because comity, the basis for exhaustion, was founded on the relation between federal courts and the states (not merely state courts), comity would not be injured by permitting the attorney general to waive exhaustion on behalf of the State. The court perceived no injury because the Florida Attorney General, as "'the chief state legal officer' of the executive department," had the authority to speak and for the state for its court system, as well.

To me, the Thompson rationale is con-

trary to the clear import of Rose, Galtieri, and the statute. Moreover, it will lead district courts to disregard the policies behind the exhaustion rule, and it will create mischief of its own accord.

First, I see no room in Rose, or Galtieri, for Thompson. Nowhere in any of the Rose opinions, even the dissent, is there even a hint that waiver is permissible. The Rose majority described its rule as a "rigorously enforced total exhaustion rule." 455 U.S. at 518, 102 S.Ct. _____. Thompson, however, holds that a district judge may enforce the rule only when he sees fit, 714 F.2d at 1509; thus, the rule will become neither rigorously enforced nor total. Justice O'Connor, for the Rose majority, and Justice Brennan, partially concurring, read the total exhaustion rule as requiring an immediate sua sponte dismissal of a mixed petition[30] and none of the other opinion

writers in Rose differed with that view of the rule. Under Thompson, though, a district court is not required to dismiss a mixed petition sua sponte; rather, it may await the attorney general's decision whether to insist on prior state court consideration of the unexhausted claims. If the attorney general decides to waive exhaustion, the district court must then address the question of whether it will keep the case or dismiss it.

The Thompson rule is also contrary to the statute, which limits the availability of relief to exhausted petitions and orders that no petition may be "deemed" exhausted unless there are no state remedies or other processes available to protect the petitioner's rights. 28 U.S.C. § 2254(b) & (c) (1976). As the third circuit held in United States ex rel. Trantino v. Hatrack, 563 F.2d 86, 96 (3d Cir. 1977), cert. denied, 435 U.S.

928, 98 S.Ct. 1499 (1978), "neither concession nor waiver relieves the federal court of its responsibility to decide only those habeas claims Congress has authorized it to hear under § 2254(b) . . . . 'Waiver,' like 'concession,' is not a talisman, the incantation of which will cause the exhaustion requirement to disappear. That requirement remains."[31]

The waiver of exhaustion idea endorsed by Thompson is flatly refuted by Bergman v. Burton, 456 U.S. 953, 102 S.Ct. 2027 (1982), a post-Rose decision. In that case the district court dismissed without prejudice an unexhausted claim from a two-claim mixed petition. The State did not contest, either in the district court or the court of appeals, the district court's authority to adjudicate the merits of the exhausted claim. See Burton v. Bergman, 649 F.2d 429 (6th Cir. 1981). Nonetheless, the Supreme Court,

sua sponte, vacated the court of appeals' judgment on the merits and remanded for dismissal in light of Rose. See discussion infra text at 21-22. The Thompson and Westbrook panels did not consider this case.[32]

It is clear that Rose bars all mixed petitions. Even if Rose left the question open, there are manifold policy reasons why we should enforce this rule. First, Rose defined the exhaustion doctrine as one designed to aid state courts, not states generally. This much the Thompson panel conceded. 714 F.2d at 1507 n. 11. A state attorney general's decision to waive the exhaustion requirement may not always be compatible with the interests of his own courts; this is no doubt why Rose provides no accommodation for an attorney general's waiver. In a capital case, for example, where a death warrant has been issued and the petitioner's execution is

scheduled to take place in a matter of days, perhaps even hours, the attorney general, in the hope of avoiding a postponement of the execution, may "waive" the petitioner's failure to exhaust all of his claims so that the petitioner's case may be concluded and he can be executed.[33] This is what happened in this case; the attorney general "waived" the formal exhaustion of at least nine claims.

While such a tactic may suit the attorney general's and the State executive department's needs of the moment, it is likely to have a pronounced adverse effect on the needs of the state courts. See Galtieri, 582 F.2d at 358. By countenancing such a tactic, the district court may be interpreted as harboring a lack of respect toward the state judicial system and the view that state judges are not as capable of rendering correct constitutional decisions as are federal judges.

As Professor Bator has noted, "nothing is more subversive of a [state] judge's sense of responsibility, of the inner subjective conscientiousness whish is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by [the federal court]." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 451 (1963). The district court also removes the state court as the primary locus for fact-finding in post-conviction relief.[34]

A second policy reason for requiring total exhaustion is that it will allow state courts to become more familar and hospitable to constitutional claims of prisoners. In this circuit, for example, we have recently articulated new standards for judging sixth and fourteenth

amendment ineffective assistance of counsel claims.[35] Were we now to commence entertaining such claims without exhaustion, we would deprive the state courts of the opportunity of becoming familiar with them and, moreover, of disposing of them on state substantive or procedural grounds.

Third, waiver damages the concept of finality in the state court system, with concurrent injury to the rehabilitation general deterrence purposes of sening.[36] See supra text at 8. The Supreme Court has admonished the federal habeas courts not to "detract from the perception of the trial of a criminal case in state court as a decisive and portentous event." Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977), cited in Galtieri, 582 F.2d at 359.

Fourth, permitting the district courts to litigate mixed petitions may

impair the quality of constitutional decision making. A petitioner's mere inclusion of unexhausted claims, especially a proffer of evidence in support thereof, might influence the district court's resolution of the exhausted claims. Accord, id. Such a scenario cannot occur if the district courts dismiss mixed petitions sua sponte, as mandated by Rose.

A fifth reason for requiring total exhaustion is to avoid the type of selective waiver by attorneys general permitted by Thompson and Westbrook. If the petition is assigned to a district judge with whom the attorney general is comfortable, a waiver will be likely;[37] if not, the attorney general may decide to move for dismissal for lack of exhaustion. Such subtle "judge shopping" would be unseemly at best. Any rule that would countenance it, however tacitly, deserves exacting scrutiny.

I foresee other shortcomings with the Thompson-Westbrook approach. One is that the entertainment of mixed petitions will, in time, promote substantial side issues, under habeas rule 9, concerning delayed and successive petitions. Assume that the petitioner brought a total of five claims, with only three exhausted. If previously the attorney general had consistently waived exhaustion but declined to do so in this case, the petitioner, if he desired to go forward with his exhausted claims, would have to amend his petition to dismiss the two unexhausted claims. Later, when he returned to the district court after exhausting the two claims, petitioner might well have a valid defense to the State's assertion under habeas rule 9 that his claims were successive or unduly delayed. He would contend that his new petition should not be deemed successive because it was

caused by a reasonable reliance on the attorney general's waiver policy. He would contend that he should not be barred by delay because "the state, having [earlier] had notice of the claims, cannot establish prejudicial delay." Galtieri, 582 F.2d at 358.

These rule 9 issues often involve difficult questions of fact, see Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068 (1963); the ones I have posed above could be quite time consuming. A policy that invites a petitioner to prosecute successive petitions, each asserting newly exhausted claims, not only impedes the orderly and complete consideration of his case in state court, it greatly impairs the efficiency of the federal habeas court to dispose of his claims. The Thompson-Westbrook rule also enables a district judge to hear both exhausted and unexhausted claims, even when the

petitioner's unexhausted claims ought to be handled by the state court first.[38] A rigorously enforced total exhaustion rule would remove the judge's temptation to hear the case.

D. Noticing Exhaustion on Appeal

Galtieri held that the policy considerations counselling total exhaustion at the district court level were outweighed when this court was presented on appeal with exhausted claims from a mixed petition. We therefore declined to endorse a rule requiring dismissal on appeal of claims from a mixed petition, 528 F.2d at 361, adopting instead a flexible approach that would allow us to pass on the merits of the petitioner's exhausted claims. This holding of Galtieri is no longer correct.

Rose v. Lundy commands "strict enforcement of the exhaustion requirement," 455 U.S. at 520, ____S.Ct.____,

at all levels of habeas litigation and permits no flexibility. In his concurrence in the Rose judgment, Justice Blackmun noted that the appellate portion of Galtieri was inconsistent with the mandate of Rose. He stated, id. at 529 n. 7:

> Even the Fifth and Ninth Circuits, which require dismissal of mixed habeas petitions in the typical case, do not follow the extreme position the Court takes today . . . . The Fifth Circuit will review the merits of exhausted claims contained in a mixed petition if the District Court has considered those claims.

See Galtieri v. Wainwright, 582 F.2d 348, 361-362 (1978) (en banc). Justice Blackmun's reading of Rose and Galtieri is correct. After Rose we may no longer review exhausted claims from a mixed petition.

The strong medicine Rose prescribes is quite understandable and, when one carefully considers the policies it seeks to vindicate, quite reasonable. This

medicine was prescribed to bring an abrupt halt to the practice of the litigation of mixed petitions. In Galtieri, we instructed the district courts not to hear them. At the same time, we said that if they did hear and decide them, we would entertain them on appeal. As it turned out, we thus provided an atmosphere for the ad hoc litigation of mixed petitions and the sub rosa disregard of the very policies that we, in Galtieri, and the Supreme Court, in Rose, sought to further.

To "strictly enforce" Rose's total exhaustion requirement and properly supervise the processing of habeas petitions by district courts in this circuit, we are bound to notice the lack of exhaustion sua sponte on appeal and to order the dismissal of mixed petitions. Any lesser course of action will not provide the rigor demanded by Rose, and will result in the continuing disregard of exhaustion

policies that Galtieri seems to have spawned. The Supreme Court in Isaac, 456 U.S. at 123 n. 25, 102 S.Ct. at 1569 n. 25, strongly intimated that an appellate court that encounters an unexhausted claim is bound by Rose to dismiss the entire habeas petition.[39] Accord, Bowen v. Tennessee, 698 F.2d 241 (6th Cir. 1983) (en banc); see also United States ex rel. Lockett v. Illinois Parole and Pardon Board, 600 F.2d 116, 118 (7th Cir. 1979) ("We conclude that there is no bar to our raising the issue of exhaustion on our own, although it has not been raised by the State either in the district court or in the briefs on appeal.") See discussion of Bergman v. Burton, infra text 21-22; see also Mattes v. Gagnon, 700 F.2d 1096, 1098 n. 1 (7th Cir. 1983) (exhaustion raised sua sponte).

In Bowen v. Tennessee, supra, the en banc sixth circuit was presented with

a case similar to this one, involving an appeal of exhausted claims from a mixed petition in which lack of exhaustion was waived. The panel had entertained the claims on the merits. The en banc court, following Rose's command, reversed:

> Wherefore, in light on [sic] the emphasis in Rose upon comity as protecting "the state courts' role in the enforcement of federal law and prevent[ing] disruption of state judicial proceedings" [adding emphasis to Rose quote], this court concludes that the total exhaustion rule promulgated in Rose may not be waived or conceded in the district court by a state attorney general and may be noticed by this court sua sponte on appeal.

698 F.2d at 243.

The sixth circuit's holding was based on Duckworth v. Cowell, 455 U.S. 996, 102 S.Ct. 1626 (1982) and Rodriquez v. Harris, 455 U.S. 997, 102 S.Ct. 1627 (1982). In both of these cases the Supreme Court encountered exhausted claims from mixed petitions which the

courts of appeals decided on the merits. The Court in each case granted certiorari, cited Rose, vacated the judgments, and remanded to the court of appeals "with directions that it instruct the [district court] to dismiss the petition for a writ of habeas corpus." 455 U.S. at 996, 102 S.Ct. at 1626; 455 U.S. at 997, 102 S.Ct. at 1627.

In Bergman, the Sixth Circuit Court of Appeals entertained on the merits an exhausted claim from a mixed petition; the district court dismissed the unexhausted claim without considering on the merits. Burton v. Bergman, 649 F.2d 428, 429 (6th Cir. 1981). The State did not, apparently, object to either court proceeding to the merits of the exhausted claim. The Court of appeals directed that the writ issue on the exhausted claim. The State petitioned the Supreme Court for certiorari, presenting in its certiorari peti-

tion only the merits of the exhausted claim. The Supreme Court granted certiorari, vacated the judgment and remanded "for further consideration" in light of Rose. As Justice Stevens, dissenting, stated,

> The petition makes no reference to the unexhausted claim. Ignoring the four questions presented by the [State], the Court grants [its] petition, vacates the judgment of the Court of Appeals, and remands for reconsideration in the light of Rose v. Lundy.
>
> Under Rose v. Lundy--if I read the Court's opinion correctly--after the case gets back to the District Court, that Court must dismiss the habeas corpus petition that is now a part of the record.

102 S.Ct. at 2027-28 (Stevens, J., joined by Marshall and Blackmun, JJ., dissenting) (footnote omitted).

Bergman instructs us, plainly, that if we fail to notice a lack of exhaustion sua sponte, the Supreme Court may. By taking the step it did, the Court showed

that a mixed petition with exhaustion implicitly waived requires remedial dismissal by any federal court which notices it. The en banc court should take such action today.

I realize that this seems to equate the exhaustion rule to a rule of subject matter jurisdiction. Exhaustion is not purely jurisdictional, because federal courts are granted subject matter jurisdiction to hear habeas corpus claims from state prisoners by 28 U.S.C. § 2241(c)(3) (1976). 28 U.S. C. §§ 2254(b) and (c) (1976), however, limit the relief a district court may grant to those "applications" that present only exhausted claims. See supra text at 1. Sections 2254(b) and (c) also narrowly define which claims may be deemed exhausted. The Supreme Court has given this statute a literal interpretation, to give full effect to the policies Congress sought to enforce.

Because no two litigants may stipulate to a district court's entertaining a habeas petition when the petition does not satisfy section 2254 and Rose, the exhaustion doctrine must be viewed as quasi-jurisdictional. Accordingly, we must notice the lack of exhaustion in this case and remand it to the district court with the instruction to dismiss the petition.

IV.

Realizing that to do so may detract from my argument that Rose mandates the dismissal of this case, I address the merits of petitioner's Witherspoon claim. The record shows that petitioner's trial counsel did not properly preserve for state appellate court review the specific issue the court decides today: whether the state trial judge was correct in concluding that venire members Varney and Murphy were sufficiently biased against the death penalty to be disqualified to

serve as jurors. Because this issue was not preserved for appeal and thus, I submit, not decided on the merits by the Florida Supreme Court, petitioner must show cause and prejudice under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977).

Petitioner did make a "Witherspoon" objection at trial, and that objection was preserved for appellate review. It was a patently unmeritorious objection, however, and as such was rejected out of hand by the Florida Supreme Court. The Witherspoon objection the court recognizes and rules upon today was not made, was therefore not preserved for appeal, and was not dealt with by the Florida Supreme Court. The petitioner has admitted as much; in presenting his Witherspoon claim to the district court he stated that it had not been exhausted.[40] This is why Sykes cause and prejudice must be shown.

Since petitioner has not made this showing, I would deny the writ.

The following chain of events makes my thesis clear. Before voir dire of the venire members began, the lawyers for the parties met with the trial judge in chambers to consider a defense motion in limine.[41] The following colloquy took place:

> THE COURT: All right. We are here to hear a motion. The State and the defendant represented by counsel, the defendant is present in person. We are to hear a motion by the defendant to limit the State Attorney of his voir dire examination, arguing the Willie Spoon [sic] case.
>
> All right, sir, I am not inclined to grant it. I will be glad to listen to you on it.
>
> MR. MALONEY [defense counsel]: Your Honor, I do not wish to argue very longly [sic]. The Court held in the Willie Sppon [sic] case the prosecutor could not ask these type of questions. In Florida we now have biforcated [sic] trial. The first part of the trial is used only to determine the question of facts, whether or not this individual committed a capital crime.

THE COURT: Yes, sir.

MR. MALONEY: I think that a question regarding how the jury would be disposed to punishment in the event they found a verdict of guilty would be irrelevant and immaterial to that trial and to their determination of the question of fact, whether or not he did it [i.e., commit murder]. And all we are asking is that such questions first not be asked by either parties, and if, in fact, the Court is going to allow the questions to be asked, that a response in the negative they would not impose the death penalty not constitute a challenge for cause.

THE COURT: No, sir, if, at the conclusion of the trial, the jury should return a verdict of guilty of murder in the first degree, which is a capital offense, the same jury would serve as the jury in the second half of the biforcated [sic] trial and there will not be a re-selection of a jury. At this time on voir dire it is necessary to ask questions of this jury including their attitude on such things and it's got to be now.

Under the Florida capital punishment law there are certain conditions set up under

which the proper penalty is the death penalty. In a prospective jury--it is my ruling if a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief he would be unwilling to recommend a death penalty, even though the facts and circumstances meet the requirements of law, then he in effect has said he would be unwilling to follow the law the court shall charge upon it and disregard and be unwilling to follow it or if he did follow it, it would be going against his principles, and, therefore, I would rule that would be disqualification. If that exists, I intend to disqualify for cause.

You made your motion and your objection and the motion will be denied. You will, of course be allowed at the time of the voir dire examination to raise your namely [sic] objection, but would indicate the ruling at this time. I am not cutting you off from objecting when we get to that specific question. Generally, that will be my ruling. I won't cut them off from inquiring in the general area; the specific questions they ask may be objectionable, I don't know.

MR. MALONEY: If I raise the objection, which I would, will

the Court make it a continuing objection?

THE COURT: Yes, sir.

MR. McDANIEL[State's attorney]: Is the Court saying it is going to be a continuing objection from here on out?

THE COURT: Continuing objection to that particular line of questions.

MR. McDANIEL: I take it your objection right now is continuing from here on out?

THE COURT: Yes, sir, to the whole general line of questions. Still I am not telling you I will deny your objection on some specific question for some other reason you feel it has gone too far.

MR. MALONEY: Yes, sir.

Trial Record, vol. 3, at 16-19 (emphasis added). It is clear to me that petitioner's lawyer, at the outset, mistakenly thought[42] that Witherspoon, applied in the context of Florida's recently enacted bifurcated trial procedure in capital cases, foreclosed any mention of the death penalty during the jury

selection process.[43]

Petitioner's motion in limine asserted two alternative grounds: first, that Witherspoon prohibited, as "irrelevant and immaterial," any venire voir dire on the issue of punishment prior to the jury's determination of guilt; second, that the court could not excuse for cause any venire member who could not vote for the death penalty. The motion was timely but unmeritorious on both grounds. As to the first ground, the motion was timely because it informed the trial judge before voir dire began that any inquiry of a venire member, in advance of the guilt phase of the trial, concerning his or her feelings about the death penalty would be "irrelevant and immaterial" and would constitute federal constitutional error. The motion was unmeritorious because such voir dire inquiry was not only proper, but required.

As to the second ground, the motion was timely because it informed the trial judge that it would be improper and would constitute federal constitutional error for him to excuse for cause any venire member who indicated that he or she "would not impose the death penalty." In other words, regardless of the extent of the venire member's bias against the death penalty, an excusal for cause would be error. Had the judge agreed with petitioner's view of the law, he would have granted petitioner's motion instanter, since a contemporaneous objection at the time of the venire member's challenge for cause would have added nothing to petitioner's motion in limine and thus would have been unnecessary. The judge did not agree, however, and properly so, because petitioner's view of the Witherspoon rule was in error. Witherspoon does not entitle a capital defendant to jurors who

"would not vote to impose the death penalty." Witherspoon only insulates from a challenge for cause a prospective juror who could vote for the death penalty under some circumstances.[44]

A Witherspoon objection must be made contemporaneously, after the prospective juror has been examined about his views on the death penalty. The objection is addressed to the juror's state of mind. In ruling on the objection, the trial judge must of course consider the questions put to the prospective juror and his responses. The judge is not restricted to these naked statements, however. The judge may also consider any evidence that bears on the venire member's bias: his demeanor, tone of voice, nonverbal communications, and comprehension of the questions asked of him and other venire members. Unless a defendant's objection is properly stated and contemporaneous,

the judge may be deprived of the opportunity to make further inquiry of the venire member and to state on the record what, if anything beyond the naked words that have been spoken, he may have considered in determining that the venire member is disqualified to serve on the jury.

After denying petitioner's motion in limine, the trial judge, recognizing the contemporaneous nature of a Witherspoon objections during voir dire to any questions put to any individual venire member concerning his or her feelings about the death penalty. The judge also invited counsel to object to the excusal for cause of anyone demonstrating a bias against the death penalty sufficient to disqualify him or her for jury service. As the record of the ensuing voir dire indicates, counsel never made such objections. Instead, counsel merely requested

the court to treat his unmeritorious pre-trial motion in limine as a "continuing objection." The court granted his request.

After the court and counsel returned to the courtroom to begin the venire voir dire, petitioner's counsel, in a final effort to insulate the venire from any examination about the death penalty, renewed the motion in limine he had just argued in chambers. He said:

> Your Honor, pursuant to the motion I filed before-hand I object to this question[ing]. I believe that it is irrelevant to the matter at hand and I think that the discussion of this at this time prejudices the defendant's right to a fair and impartial trial.

Trial Record, vol.3, at 43-44. The court denied counsel's motion, and the venire voir dire commenced.

Throughout the voir dire the trial judge's attention was obviously focused on petitioner's motion in limine as peti-

tioner's motion in limine as petitioner had stated it in his formal pretrial pleading, supra note 40, and in chambers. As the colloquy on voir dire shows, petitioner's counsel said nothing to indicate that he intended his "continuing objection" to mean anything more than what he had presented to the court prior to trial.[45] His "continuing objection" did not grow into its present form until his final amendment to his habeas petition in the district court.

The second venire member to be examined, and the first to be excused for Witherspoon cause, was Mr. Varney. Venire member Varney was excused for cause after the court's Witherspoon inquiry. Id., at 45. When the court announced that it would excuse Varney for cause, petitioner's counsel stated "I renew the objection. I do not think he should be challenged for cause." By this the lawyer

that he renewed his motion in limine. The court replied, correctly, "Yes, sir, the objection will be noted and overruled." Moments later the court excused venire member Mays for cause, stating "Mr. Maloney, I assume you wish the same objection to apply to him." Moments later the court excused venire member Mays for cause, stating "Mr. Maloney, I assume you wish the same objection to apply to him." Maloney replied, "Yes, your honor," id. at 46, again referring to his motion in limine. The third excusal for cause under Witherspoon took place following the examination of venire member Carn. After a long colloquy with her, the court excused her. Id., at 107. Counsel objected, stating "Your honor, once again I object, I don't think that is relevant" (emphasis added), an obvious reference to the first ground of his motion in limine. The court stated, "Objection will be

noted." Counsel's objection, here, shows that he continued to challenge the relevancy of the line of questioning rather than the sufficiency of the bias shown by excused venire members. The court next excused for cause venire member Maher. Id., at 110. After her negative answer to the proper Witherspoon questions, the court said, "Very well, over the objections of the defendant she will be excused." Counsel said nothing, apparently satisfied that his continued objection was being honored.

The last venire member excused for cause under Witherspoon was Murphy. After Murphy was excused, id. at 165, counsel said nothing, and the clerk called the next venire member. The court then spoke to the court reporter, "Mrs. Horne, you will note the defendant object [sic] to him [Murphy] being excused for cause." This was nothing more than the

court's acknowledgement that it had considered petitioner's motion in limine as having been renewed and denied. At no time did the defense counsel object to Murphy's excusal on the ground that Murphy had not made it unmistakably clear that he would automatically vote against the death penalty (the issue brought to the district court, and decided by us today) or that his feelings against the death penalty would impair his ability to find guilt.

By failing to state a proper contemporaneous objection, counsel denied the trial judge the opportunity to question Murphy further or to state the reasons why he concluded that Murphy was disqualified. Those reasons might have gone beyond Murphy's naked response to the questions put to him. As I have indicated, supra text at 27, the judge may have relied on Murphy's demeanor,

nonverbal communications, tone of voice, his comprehension of the Witherspoon inquiry directed to him and other venire members, and any other evidence that may have indicated the extent of Murphy's bias.

Florida law is settled that if a cpaital defendant wishes to object to the exclusion of a venire member for cause he must make a timely and proper objection. Brown v. State, 381 So.2d 690, 693-94 (Fla.), cert. denied, 449 U.S. 1118, 101 S.Ct. 931 (1980); Paramore v. State, 229 So.2d 855 (Fla. 1969), vacated on other grounds, 408 U.S. 935, 92 S.Ct. 2857 (1972). Failure to make a timely and proper objection waives the issue. Id.; see also 33 Fla. Jur. 2d, Juries § 109 (1982); Fla. Stat. Ann. § 913.03 (1983). Because petitioner failed to object to Murphy's excusal for cause on the ground that Murphy did not unequivo-

cally indicate that he would automatically vote against the death penalty, petitioner waived that issue. Consequently, the Florida courts would not, and apparently did not,[46] consider the issue decided here: whether Murphy was excluded for showing the type of bias justifying a Witherspoon escusal for cause.

In summary, petitioner has brought us an objection he did not raise in state court. Failure to follow Florida's clear, and unambiguous, contemporaneous objection rule constituted a "procedural default" under Wainwright v. Sykes, supra. Accordingly, petitioner must show cause for failing to object, and actual prejudice resulting from the forfeiture.[47] See Douglas v. Wainwright, 714 F.2d 1532, 1547 (1983).

"Cause and prejudice" is a conjunctive standard, both prongs of which must be satisfied by the petitioner before a

court is free to ignore the procedural default and hear the merits of the petitioner's claim. Isaac, 456 U.S. at 134 n. 43, 102 S.Ct. at 1575 n. 43. A petitioner may not raise a procedurally defaulted claim without meeting the standard. See United States v. Frady, 456 U.S. 152, 102 S.Ct. 1584 (1982) 28 U.S.C. § 2255); Douglas, 714 F.2d at 1547. This petitioner has not shown cause and prejudice; Wainwright v. Sykes, requires us to deny the writ. Sykes, 433 U.S. at 85, 97 S.Ct. at 2505; Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir. 1983) (procedural default on Witherspoon; burden to show cause and prejudice on petitioner); see also Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691 (1976) (prisoner forced to wear prison garb at trial must preserve objection). See generally C. Wright, Federal Courts 339-43 (4th ed. 1983).

The Sykes opinion identified important interests advanced by requiring compliance with a state's contemporaneous objection rule as a precondition to obtaining federal habeas relief. Such a requirement "enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest" and "enables the judge [such as the one in petitioner's case] who observed the demeanor of those witnesses to make the factual determination necessary for properly deciding the federal constitutional question." 433 U.S. at 88, 97 S.Ct. at 2507. See discussion supra text at 27, 30. Failure to enforce the contemporaneous objections rule, the Court stated, "may encourage 'sandbagging' on the part of defense lawyers who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional

claims in a federal habeas court if their constitutional claims in a federal habeas court if their initial gamble does not pay off." Id. at 89, 97 S.Ct. at 2508. Further, insisting on contemporaneous objection is desirable because it "encourages the result that [state trial] proceedings be as free of error as possible." Id. at 90, 97 S.Ct. at 2508. The policy considerations expressed in Sykes apply fully to petitioner's case.

We should consider the Sykes issue even though the state did not raise it in the district court or on appeal. Isaac is the latest full Supreme Court exposition on state procedural default and federal habeas relief. That case presented to the Supreme Court three consolidated habeas proceedings in which the petitioners had failed to object to improper jury instructions. The constitutional issue concerning their claims was

fairly novel. Even though the State never raised the procedural default issue against one of the petitioners, the Supreme Court stated that both the district court and the court of appeals had properly considered the issue. Id. at 124 n. 26, 102 S.Ct. at 1570 n. 26. The Isaac Court distinguished two prior cases, neither of which bar our consideration of the issue sua sponte.[48] Moreover, policy considerations stated by Sykes favor our raising the issue. Petitioner sandbagged his claims and dumped them in the district court. Had he made a proper Witherspoon objection at trial, the putative error could have been resolved, or at least clarified. Petitioner is not entitled to the writ.

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1 582 F.2d 348, 355 (5th Cir. 1978), citing West v. Louisiana, 478 F.2d 1026, 1034 (5th Cir. 1973), aff'd regarding exhaustion en banc, 510 F.2d 363 (5th Cir. 1975). In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

2 582 F.2d at 351.

3 Justice O'Connor, speaking for the Court, explained the "rigorously enforced total exhaustion rule," 455 U.S. at 518, ___ S.Ct. ___, in parts III A and B of her opinion. She was joined in those sections by Chief Justice Burger and Justices Rehnquist and Powell. Justice Brennan, joined by Justice Marshall, concurred in the rule, id. at 532, ___ S.Ct. ___ ("I agree with the Court's holding that the exhaustion requirement of 28 U.S.C. § 2254(b), (c) obliges a federal district court to dismiss, without consideration on the merits, a habeas corpus petition from a state prisoner when that petition contains claims that have not been exhausted in the state courts."). Justice White agreed with Justice Blackmun's concurrence in the judgment, which opined that a district court need not dismiss every mixed petition, but could consider exhausted claims. Justice Stevens dissented.

4 The district court's order preceded Rose v. Lundy by 10 months.

5 Judge Fay, infra at ___, slip op. at ___, states that the petitioner has

exhausted all his state remedies. I suggest that the record is to the contrary. See infra notes 9-13 and accompanying text.

6 According to the Florida Supreme Court, petitioner alleged the following grounds for reversal: (1) the racial composition of the jury venire was improper; (2) improper exclusion of prospective jurors because of their expressed attitudes toward the death penalty; (3) the alleged unconstitutionality of the sentencing provisions of the applicable Florida statutes; (4) the State's eliciting from a State witness a comment regarding other murder cases in which petitioner was a suspect; (5) and (6) in-court identifications of two victims were tainted by improper pretrial show-ups; (7) erroneous admission into evidence of a gun allegedly used by petitioner in committing the holdup and murder; and (8) prosecutorial misconduct concerning closing argument. Darden v. State, 329 So.2d 287, 288 (Fla. 1976).

7 Petitioner collaterally attacked his conviction under Fla. R. Crim. P. 3.850 (1984), alleging ineffective assistance of counsel and newly discovered evidence. Darden v. State, 372 So.2d 437 (Fla. 1979). Additionally, he attacked the executive department's clemency procedures in a separate suit. Darden v. Graham, 372 So.2d 436 (Fla. 1979). The Florida Supreme Court rejected all three claims on the merits.

8 The record does not contain the briefs the petitioner and the State filed with the Florida Supreme Court in these appeals; thus we have no definitive means

of determining whether petitioner's claims of error were grounded on federal or state law. This problem would not have arisen had the Florida Attorney General complied with his duty under the federal habeas corpus rules by attaching copies of petitioner's briefs to the Florida Supreme Court to his answer to petitioner's habeas petition. See rule 5, Rules Governing § 2254 cases, 28 U.S.C. foll. § 2254 (1976): "If the petitioner appealed from the judgment of conviction or from adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer."

9 This is a tactic the State should have pursued in the state collateral attack court, since under the exhaustion doctrine the state courts have the initial responsibility to address and dispose of a petitioner's federal constitutional attack on his conviction. See infra text at 6-11.

10 The first three claims, stated in the original petition or by the initial amendment, were (1) prosecutorial misconduct, primarily in closing argument; (2) improper pretrial indentifications; and (3) ineffective assistance of counsel. The remaining claims, stated in the interrogatories, were (4) that petitioner's execution would constitute excessive punishment in violation of due process and the eighth amendment because the justifications asserted to support the death penalty were insufficient to take his life; (5) the death sentence violated the eighth amendment because it would inflict unnecessary pain and

torment; (6) prosecutorial misconduct in the penalty phase; (7) petitioner's counsel rendered ineffective assistance of counsel at the penalty stage of his trial; (8) petitioner's execution would violate due process and equal protection because the Office of Executive Clemency operated in an unfair, irregular, and arbitrary manner; (9) the jury was selected using procedures that systematically excluded persons having conscientious or religious scruples against the death penalty; (10) petitioner's sixth amendment rights were violated because persons with scruples against the death penalty were excluded from the jury so that it did not represent a cross-section of the community; (11) because of petitioner's poverty he was denied the opportunity to prepare and present evidence against the death penalty; (12) petitioner was not given adequate notice or opportunity to present evidence and argument addressed to the sentence; (13) petitioner was denied timely notice of, and fair opportunity to meet, prejudicial evidence presented at his penalty trial; (14) the sentence was based upon facts not established beyond a reasonable doubt; (15) because of petitioner's poverty he was denied a chance to present a defense to the capital charge; (16) the grand and petit juries were selected through procedures which systematically excluded racial minorities from jury service; (17) considering the circumstances of the offense and offender, the death penalty was grossly disproportionate and excessive; (18) petitioner's death sentence was the result of the selective prosecution in Polk County and the Tenth Judicial Circuit of capital defendants who refused to plead guilty; (19) petitioner's sentence was imposed pursuant

to a system of arbitrary and capricious capital sentencing; (20) his sentence was imposed pursuant to racial discrimination in capital sentencing; (21) his sentence was imposed pursuant to wealth discrimination in capital sentencing; (22) his sentence was imposed pursuant to gender discrimination in capital sentencing; (23) given the circumstances surrounding petitioner and his offense, the sentence imposed was disproportionate and excessive when compared to similar cases; (24) the Florida Supreme Court denied petitioner notice and opportunity to be heard concerning its proportionality review of his sentence and because of his indigency denied him facts regarding similar cases; (25) because of his indigency the state denied petitioner opportunity for commutative relief; and (26) petitioner was legally incompetent [time unspecified] and the state denied him funds to prove same.

11 See supra note 8 and accompanying text.

12 See supra note 10 claims 1-3, 6-8.

13 This type of claim is usually one that is not adequately preserved at trial, or is abandoned by failure to bring it on appeal. In either case, the state courts generally will not hear the claim further. See e.g., Hargrave v. State, 396 So.2d 1127 (Fla. 1981); Fla. R. Crim. P. 3.850 (1984). A Florida court will not recognize such a procedurally defaulted claim and grant relief thereon; therefore, a federal district court may hear such a claim on habeas without the petitioner first presenting the claim to state court. See § 2254(b) ("absence of available State

corrective processes . . ."). Accord, Engle v. Isaac, 456 U.S. 107, 125 n. 28, (1982). See also Galtieri, 502 F.2d at 354. Of course, no habeas petitioner may bring a procedurally defaulted claim into federal court without showing cause and prejudice under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977) and its progeny. See, e.g., Isaac, supra, at 129, 102 S.Ct. at 1572 ("when a procedural default bars state litigation of a constitutional claim, a state prisoner may not obtain federal habeas relief absent a showing of cause and actual prejudice").

The habeas petition in this case alleged a number of claims not presented to a state court but permissible under §2254(b)--with a showing of cause and prejudice--because no adequate state remedy existed at the time of filing. See supra note 10 (claims 4-5, 9-16, and possibly claim 18).

14 See supra note 10 (claims 17, 19-26, and possibly claim 18).

15 Thompson discussed comity as it served "the interests of the state and its sovereignty . . . ." 714 F.2d at 1506. Rose, however, described the role of exhaustion in "protect[ing] the state courts' role in the enforcement of federal law and . . . state judicial proceedings." 455 U.S. at 518, 102 S.Ct. at 1203 (emphasis added). See, e.g., Thompson, 714 F.2d at 1507 n. 11; Rose, 455 U.S. at 518, ___S.Ct.___(1982).

16 Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity

> to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

Rose, 455 U.S. at 518, ___ S.Ct. ___, Darr v. Burford, 339 U.S. 200, 204, ___ S.Ct. ___ (1950).

17 Rose, 455 U.S. at 519, ___ S.Ct. ___; Galtieri, 582 F.2d at 354 (without exhaustion "state court system would be isolated from federal constitutional issues and would not have an impetus to develop and apply federal constitutional law").

18 Accord, Isaac, 456 U.S. at 128 n.33, 102 S.Ct. at 1571 n. 33.

19 "We have always recognized. . .that the Great Writ entails the exhaustion principle in depth from the standpoint of state courts. Isaac, 456 U.S. at 126, 102 S.Ct. at 1571.

20 Thompson failed to acknowledge this point; it only analyzed the exhaustion principle in depth from the standpoint of state courts. See 714 F.2d at 1505-07.

21 In capital cases, however, the collateral attack is usually delayed until a death warrant issues, scheduling the prisoner's execution. In this case, petitioner was convicted in 1974, but the

Governor did not issue the death warrant until 1979. The Florida collateral attack rule, Fla. R. Crim. P. 3.850 (1983), allowed petitioner to challenge his conviction and death sentence "at any time." Most likely, he waited until the eleventh hour to challenge his conviction in the state courts, and then in the district court, because he thought this would give him the best chance to obtain a stay of his execution. Moreover, the more complicated a petitioner's claims are, especially if they need an evidentiary hearing to be resolved, the greater the chance is that a stay will be forthcoming, at least until his claims are determined.

22 Cf. Hill & Baker, Dam Federal Jurisdiction!, 32 Emory L. J. 3, 80 (1983):

> We submit that no federal jurist would seriously maintain that the federal courts are quite adequate to the enforcement of constitutional guarantees and that state courts are not needed. Therefore, it is important that whatever cleavage may have developed be bridged as soon as possible. This will require that the state courts assume full responsibility in these areas and that the federal courts recognize the important role of the States. . . .

23 See Railroad Comm'n v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643 (1943).

24 455 U.S. at 532, ___ S.Ct. ___. (Brennan, J., joined by Marshall, J., concurring in part and dissenting in

part).

25 Rule 9, Delayed or Successive Petitions, Rules Governing § 2254 Cases. 28 U.S.C. foll § 2254 (1976).

26 455 U.S. at 520, ___S.Ct.____.

27 Id.

28 One of the economies of the total exhaustion rule is that the district court should be spared the often difficult task of determining, for example, whether, under the Thompson-Westbrook rule, see infra text at 11-18, it should entertain a mixed petition, or whether there has been an abuse of the writ or undue delay within the meaning of Rule 9, 28 U.S.C. foll. § 2254 (1976). This latter determination may require an evidentiary hearing. See, e.g., Sanders v. United States, 371 U.S. 1, 83 S.Ct. 1068 (1973).

29 See also Lamb v. Jernigan, 683 F.2d 1332, 1325 n.1 (11th Cir. 1982), cert. denied 103 S.Ct. 1276 (1983). The fourth circuit also permits explicit waiver. Sweezy v. Garrison, 694 F.2d 331, 333 (4th Cir. 1982) (per curiam), cert. denied 103 S.Ct. 1882 (1983). The fifth circuit seems to have not yet made up its mind, although the Thompson panel indicated otherwise, 714 F.2d at 1502. Compare Felder v. Estelle, 693 F.2d 549, 554 (5th Cir. 1982) (citing Galtieri permitting explicit waiver) with Scott v. Maggio, 695 F.2d 916, 919 n. 4 (5th Cir.) cert. denied 103 S.Ct. 3544 (1983) (not clear after Rose whether waiver permissible). Courts of Appeal for the first, second, third, sixth, and tenth circuits have refused to permit waiver. E.g.

Bowen v. Tennessee, 698 F.2d 83, 87 (6th Cir. 1983) (en banc); Navanjo v. Ricketts, 696 F.2d 83, 87 (10th Cir. 1982) (per curiam); Slotnick v. O'Lone, 683 F.2d 60, 61 (3d Cir. 1982), cert. denied 103 S.Ct. 1206 (1983); Sostre v. Festa, 513 F.2d 1313, 1314 n. 1 (2d Cir.), cert. denied, 423 U.S. 841, 96 S.Ct. 72 (1975); Needel v. Scafati, 412 F.2d 761, 766 (1st Cir.), cert. denied 396 U.S. 861, 90 S.Ct. 133 (1969). The Seventh Circuit has all but adopted a no-waiver rule, Mattes v. Gagnon, 700 F.2d 1096, 1098 n. 1 (7th Cir. 1983) (federal habeas court must consider exhaustion even if not raised by parties). See also Ventura v. Cupp, 690 F.2d 740, 741 (9th Cir. 1982) (per curaim) (district court must dismiss unexhausted petition unless petitioner shows no other remedies or good cause); Batten v. Scurr, 649 F.2d 564, 567-8 (8th Cir. 1982) (court will not raise exhaustion when state conceded exhaustion, considerable time invested in case, and exhaustion not challenged in appeals court).

Of the foregoing cases, all are post-Rose with the exception of Sostre, Needel, and Batten.

30 See supra note 24 and accompanying text. The seriousness with which the Supreme Court views the exhaustion requirement is also evident from Anderson v. Harless, ___ U.S. ___, 103 S.Ct. 276 (1982), rev'g 664 F.2d 610 (6th Cir. 1982), where the Court granted certiorari and reversed on exhaustion alone. See ___ U.S. ___, 102 S.Ct. 18 (1981) (seventh circuit, when presented with obvious constitutional claim, should have dismissed because claim unexhausted).

31 This strong admonition, of course, is even more cogent after Rose.

32 Thompson and Westbrook also did not address the similar cases duscussed infra text at 21.

33 In noncapital cases the attorney general may have just the opposite incentive. If it is in his interest to delay as long as possible the petitioner's release from custody on a federal habeas writ, the attorney general will likely urge the district court to dismiss the petition for want of exhaustion.

34 Judge Hill and Professor Baker have observed this fact in arguing the need for more federal deference to state court decision making:

> [T]he protection of the constitutional rights of the citizens is not, ought not be, and cannot be the exclusive business of the federal courts. There simply are not enough federal judges and federal courts to see to the protection of all the people and all their rights. That is reason enough for the fact that state jurists are obligated to apply federal law and federal constitutional guarantees in their work. Indeed, how else can one expect the state judiciary to identify with and protect federal rights than by having a hand in their evolution?

Hill & Baker, supra note 22, at 79.

35 See Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B 1982) (en

banc), cert. granted, ___U.S.___, 103 S. Ct. 2451 (1983).

36 In Galtieri we noted a similar difficulty caused by mixed petitions. When a prisoner is required to be brought before a federal tribunal only once there is less disruption in his custodial status. We noted that complete exhaustion lessened the possibility of intermittent interruptions of a petitioner's prison sentence, thus aiding the state's correctional system, especially it rehabilitative programs. 582 F.2d at 360.

37 Under Thompson's rationale, the district judge may have discretion not to accept the waiver, in which event he would, presumably, dismiss the mixed petition.

38 For example, the unexhausted claims may involve novel questions of state law, better handled in state court, which may be dispositive of the petitioner's case. Such a case was presented to the district court in Washington v. Strickland, 693 F.2d 1243, ____(5th Cir. Unit B 1982) (en banc) (Tjoflat, J., _____), cert. granted ____U.S.____, 103 S.Ct. 2451 (1983).

39 Rose applies to pending appeals, such as this one. Bergman v. Burton, 456 U.S. 953, 102 S.Ct. 2026 (1982); Rodriquez v. Harris, 455 U.S. 997, 102 S.Ct. 1627 (1982); Duckworth v. Cowell, 455 U.S. 996, 102 S.Ct. 1626 (1982).

40 Petitioner's Witherspoon claim was made a part of his habeas petition on September 14, 1979. See, e.g., supra, text at 3. The claim first surfaced in

petitioner's answers to the State's interrogatories that asked the petitioner to disclose any federal constitutional claims that he had in addition to the three claims he presented in his original and first amended habeas petitions. Id., at 3-4. He stated that he had 23 additional claims, including the Witherspoon claim here in issue, and that none of these additional claims had been exhausted. App. Rec., vol. 1, ex. 20. Several of these 23 claims, including the Witherspoon claim, were, of course, technically exhausted, in that petitioner had failed seasonably to raise them either at trial or on appeal, and he was consequently barred from presenting them to the state courts for consideration on the merits. See supra note 13 and accompanying text. Accord, Engle v. Isaac, 456 U.S. 107, 125 n. 28, 102 S.Ct. 1570 n. 28 (1982).

41 Fifty days before petitioner's case was called for trial he moved the court to foreclose both the prosecution and the defense (and presumably the court) from examining any prospective juror, during the voir dire of the venire, as to his or her views about capital punishment and to deny all challenges for cause based on such views. Petitioner's motion read as follows:

> COMES NOW the Defendant, by and through his undersigned counsel, and moves this Court for an order limiting the voir dire examination of the prospective jurors, and alleges:
>
> 1. That under the Supreme Court's ruling in Witherspoon v. Illinois, 389 U.S. 1035, 88 S.Ct.

793, 19 L.Ed.[sic] 822, the Supreme Court's ruling in a non-bifurcated trial, the prosecutor could be allowed to ask whether or not a juror would ever consider imposing the death penalty.

2. That subsequent to the enactment of Florida Session Law 72-724, Florida Statute 921.141 provides for two (2) deliberations by a Florida jury - one to consider guilt or innocence, and a subsequent deliberation to consider mercy or no mercy.

3. That any questions asked by a prosecutor relating to whether or not a juror would even consider capital punishment in no way relates to, is not reasonably related to nor relevant to a decision on the defendant's guilt or innocence and an answer by a juror that the juror could not consider the death penalty would not in any way affect the ability of the juror to participate fully and freely in deliberations on the question of innocence or guilt.

4. That to allow the prosecutor to ask Witherspoon-type questions and be granted challenges for cause on the basis that the juror could not consider the death penalty unduly prejudices the defendant's right to a fair trial, in violation of

his right to a fair and impartial jury trial and to due process in violation of the Fifth and Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 22 of the Florida State Constitution.

WHEREFORE, the defendant requests that this Honorable Court enter an order limiting both the prosecution and the defense from asking any questions of the prospective jurors relating to their belief either for or against the death penalty and to deny any and all challenges for cause based upon Witherspoon-type questions.

Trial Record, vol. 1, at 106-107.

42 His mistake was understandable, perhaps, given the fact that this was the first post-Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972), capital case tried in Polk County, Florida, and counsel did not know until the morning the trial was to begin that he would be the defense attorney (petitioner had two lawyers) who could conduct the jury voir dire.

43 Precisely when, if at all, counsel thought the jurors were to be qualified for service during the sentencing stage of the trial does not appear in the record.

44 Witherspoon authorizes the excusal for cause of:

(1) a venire member who makes unmistakably clear that he

> would automatically vote against the imposition of capital punishment without regard to the evidence presented or
> (2) a venire member whose attitude toward the death penalty would prevent him from making an impartial determination of the defendant's guilt.

See Adams v. Texas, 448 U.S. 38, 44, 100 S.Ct. 2521, 2526 (1980).

45 We have considered in a related context the inadequacy of a motion in limine to serve the purposes of a contemporaneous objection. "[M]otions in limine are frequently made in the abstract and in anticipation of some hypothetical circumstance that may not develop at trial. . . [A contemporaneous objection] will give the trial court an opportunity to reconsider the grounds of his motion in light of the actual--instead of hypothetical--circumstances at trial." Collins v. Wayne Corp., 621 F.2d 777, 784 (5th Cir. 1980). See Annot., 63A.L.R.3d 311, 333 (1975) (citing cases).

46 Petitioner's motion in limine, based on a faulty interpretation of Witherspoon, is in the trial record. See supra note 41 and accompanying text. It, and the trial court's ruling thereon, was before the Florida Supreme Court on direct appeal. That court, in describing the claims presented to it, stated that petitioner sought reversal because of "the exclusion of prospective jurors because of their expressed attitudes toward the death penalty." 329 So.2d at 288. That is all the court had to say on the matter. Had petitioner raised the precise

Witherspoon claims he presents here as to venire members Murphy and Varney's bias, the Florida Supreme Court would have been bound by its contemporaneous objection rule to reject those claims on procedural grounds. See supra note 41 and accompanying text.

47 It is a settled rule that where a state court in a post-conviction proceeding rules on the merits of a procedurally defaulted claim, the federal court may proceed to the merits of the claim without inquiring as to the existence of cause and prejudice. Douglas, 714 F.2d at 1547 n. 19; Thomas v. Blackburn, 623 F.2d 383, 386 (5th Cir. 1980), cert. denied, 450 U.S. 953, 101 S.Ct. 1413 (1981). No state court ruled on the merits of the Witherspoon claims petitioner presents here. See supra notes 41 & 46. Accordingly, he must overcome the cause and prejudice hurdles.

48 The Court distinguished Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981) and Jenkins v. Anderson, 447 U.S. 231, 101 S.Ct. 2124 (1980). Although Smith and Jenkins have been cited for the proposition that a court should not entertain a procedural default sua sponte, see Thompson, 714 F.2d at 1503, neither case fully considered the issue. In Smith the Court simply said:

> For reasons stated by the Court of Appeals, we reject the State's argument that respondent waived his Fifth Amendment claim by failing to make a timely, specific objection to Dr. Grigson's testimony at trial. See 602 F. 2d, at 708, n. 19. In addition,

> we note that the State did not present the waiver argument in its petition for certiorari. See this Court's Rule 40(1)(d)(2) (1970).

451 U.S. at 468 n. 12, 101 S.Ct. at 1876 n.12. The Jenkins Court limited its discussion to raising the procedural default sua sponte in the Supreme Court:

> The petitioner did not raise his constitutional claims during his state-court trial. Thus, the respondent argues that the rule of Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977), bars consideration of the petitioner's habeas petition. But the respondent failed to raise the Sykes question in either the District Court or the Court of Appeals. Ordinarily, we will not consider a claim that was not presented to the courts below. See Dorszynski v. United States, 418 U.S. 424, 431, n 7, 41 L.Ed.2d 855, 94 S.Ct. 3042 (1974). Considerations of judicial efficiency demand that a Sykes claim be presented before a case reaches this Court. The applicability of the Sykes "cause"-and-"prejudice" test may turn on an interpretation of state law. See Rummel v. Estelle. 445 U.S. 263, 267, n. 7, 63 L.Ed. 2d 382, 100 S.Ct. 1133 (1980). This Court's resolution of such a state-law question would be aided significantly by the views of other federal courts that may possess greater familiarity with Michigan law. Furthermore, appli-

> cation of the "cause"-and-"prejudice" standard may turn on factual findings that should be made by a district court. Accordingly, we do not consider the Sykes issue in this case.

447 U.S. at 234 n. 1, 100 S.Ct. at 2127 n. 1. Application of the cause and prejudice standard in the instant case requires no fact-finding. Accordingly, Smith and Jenkins do not militate against our proceeding sua sponte, and Isaac encourages us to do so.

FAY, Circuit Judge, concurring in part and dissenting in part, with whom RONEY and HENDERSON, Circuit Judge, and LEWIS [MORGAN], Senior Circuit Judge, join.

Over ten years ago, on September 8, 1973, Willie Darden shot Carl Turman between the eyes and killed him while robbing his wife, Helen Turman. Interrupted by a sixteen year old boy who tried to aid Carl Turman, Darden tried to kill him by shooting him in the mouth, neck and side. In addition, Darden attempted to force Helen Turman to commit an unnatural sex act upon him at gun point. Convicted and sentenced to death, Darden has exhausted his legal remedies in both the state and federal courts. By a divided and confused court, the majority now holds that the trial jury selected in January, 1974 was not asked the proper questions under Witherspoon.[1] I concur in that portion of the majority opinion discussing the law

controlling the Witherspoon issue but dissent from that portion dealing with the application of this legal standard.

As stated in the panel opinion:

> Witherspoon has been interpreted in a plethora of cases. It is well settled that a state has the power to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.
>
> Adams v. Texas, 448 U.S. 38, 44, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980), quoting Witherspoon v. Illinois, 391 U.S. at 522-23, n.21 88 S.Ct. at 1777 (emphasis in original).
>
> Neither Witherspoon nor Adams provides trial courts with a formula or requisite colloquy for the proper excusal of prospective jurors on Witherspoon grounds. Instead, the trial judge must decide whether each particular venireperson has made it

> 'unmistakably clear' that he or she is within one of the two prongs of Witherspoon. The trial judge is in the best position to evaluate the prospective juror's demeanor and answers to the questions. For this reason, trial judges are generally accorded broad discretion in evaluating juror impartiality. See, Irwin v. Dowd, 366 U.S. 717, 81 S.Ct. 1939, 6 L.Ed.2d 751 (1961); United States v. Robbins, 500 F.2d 650, 653 (5th Cir. 1977). This tenet has even greater efficacy in a situation such as the present one - a federal appellate court reviewing the decision of a federal district court on a § 2254 habeas corpus petition alleging constitutional error in a state trial.

699 F.2d at 1037-8.

As pointed out by the majority, application of the Witherspoon rule involves a mixed question of law and fact. Mixed questions of law and fact involve the application of legal principles to the historical facts. The development of the facts is in the trial court. It is the trial judge who conducts and participates in the voir dire

examination. It is the trial judge who must evaluate, analyze and interpret the responses of the venirepersons. "In assessing the adequacy of a venireperson's response to Witherspoon questions, a reviewing court must grant some deference to the trial court's assessment of the juror's demeanor and clarity of his answer." McCorquodale v. Balkcom, No. 82-8011, slip op. at 1259 (11th Cir. Dec. 30, 1983). (emphasis added) "Witherspoon requires a reviewing court to independently review the record to ensure that the exclusions were proper, but that review must take into account that the trial judge was in a much better position to evaluate the clarity of a juror's response." Id. at ____, citing O'Bryan v. Estelle, 714 F.2d at 395 (5th Cir. 1983) (Higginbotham, J. concurring). The discussion of Judge Higginbotham in O'Bryan, cited above, is

an excellent analysis of the many factors involved in the standard of review for appellate courts dealing with this issue. I adopt it in full and set forth here some pertinent extractions.

> The selection of a jury in a capital case includes many judgment calls by trial judges - calls that involve the judge's intuition about the demeanor of the venireman, the appropriateness of his response, his manner, dress, and his inflection. It is a decision with the usual stuff of trial court decisionmaking, calls more dependent upon intuition, shrewdness, or courtroom savvy than abstract analogical processses. Correspondingly, one need not pause for long to summon up myriad examples of expression whose meaning can only be determined by the inflection and manner of its expression. For example, the simple expression 'I could hardly do so' may or may not express doubt.
>
> In sum, ruling upon a request to exclude a venireman inevitably involves an interpretation of what was asked and answered. The dynamic trial scene is not easily conformed to a mold judicially shaped to facilitate review or to achieve a targeted level of accuracy, perhaps because few but lawyers and judges talk and

think in such a fashion, peculiarly so with the interrogation of veniremen in death cases. Indeed, there is almost a pattern in the clarity and certainty of response - progressing from hesitation and vagueness at the outset toward greater comprehension and clarity at the end. And this mental groping ought not be a surprise. Few citizens chosen at random have so thought through the profound moral and ethical questions implicated by a Witherspoon qualification as to do otherwise.

A trial court's decision to sustain a challenge for cause because the venireman would automatically vote against the death penalty sometimes presents questions of fact in the sense that the trial court must choose from permissible inferences. That choice is often aided by the opportunity to observe and sometimes cannot be made without that opportunity.

Id. at 7320-21.

Appellate review of mixed questions of law and fact and questions of ultimate fact was discussed by the Supreme Court in Swint. The Court intimated that the two categories may involve essentially the same type of determination, of whether the legally determinative consideration is 'satisfied by subsidiary facts admitted or found by the trier of fact.' 102 S.Ct. at 1788-89 n.16. Cases

similar to Witherspoon, involving exclusions of veniremen for bias resulting from pre-trial publicity, traditionally have been characterized as involving a mixed question of law and fact. Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961); Reynolds v. United States, 98 U.S. 145, 156, 25 L.Ed. 244 (1878). For that reason in these cases there is an appeal an independent evaluation of the voir dire testimony. Irvin v. Dowd, 366 U.S. at 723, 81 S.Ct. at 1642; United States v. Williams, 523 F.2d 1203 (5th Cir. 1975); Wansley v. Slayton, 487 F.2d 90, 98 (4th Cir. 1973), cert.denied, 416 U.S. 994, 94 S.Ct. 2408, 40 L.Ed.2d 773 (1974). Yet, citing Irvin v. Dowd, we held in United States v. Robbins, 500 F.2d 650 (5th Cir. 1974), that 'rulings on suggestions of impartiality of the jury is within the discretion of the trial judge, and an abuse of that discretion must be clear.' Id. at 653. See also Dennis v. United States, 339 U.S. 162, 168, 70 S.Ct. 519, 521, 94 L.Ed. 734 Z (1950). This combination of independent review and deference to the trial judge was evident in United States v. Taylor, 554 F.2d 200 (5th Cir. 1977). We noted there that the trial judge had discretion to decide whether to excuse a juror but nonetheless reversed his decision not to do so. Though we did not expressly characterize our review as "inde-

pendent, we reexamined the colloquy between the judge and juror, noted that '[i]t was apparent to the judge that [the juror] was extremely reluctant to sit on this jury, and concluded that '[t]he right to an impartial jury trial, free of fear, dominated all other considerations.' These cases establish that reviewing courts can engage in an independent review and simultaneously give weight to trial court decisions.

Id. at 7321-22

In summation, Judge Higginbotham concludes:

An extreme standard of proof coupled with a standard of decision calling for an extreme level of stated partiality requires reviewing courts to freshly make the Witherspoon decision. At the same time, both the standard of proof and nature of the venire decision itself counsel against a total ban of deference to such trial court decisions. All considered, I am persuaded that independent appellate review by a standard of abuse of discretion responds to the concerns of Witherspoon while expressing the values of comity and of respect for trial court integrity with its sometime superior opportunity for accurate decisionmaking. Independent review is an understandable expression of appellate courts' reluctance to tie their hands in advance when the stakes are so high. Here an abuse of discretion stan-

> ard will allow reviewing courts freedom to correct asserted Witherspoon error without dilution of its demanding standard while giving weight to the trial court's decision as warranted by the circumstances of the particular case.

Id at 7324.

My disagreement with the majority holding is in the application of our yardstick to the record of this case. The majority opinion has extracted the question put to Mr. Murphy after he was called into the jury box but ignores all that went on in the courtroom before that moment. Most respectfully, I suggest this is not the correct approach. Trial juries are selected in a variety of ways but none are a mystery. This particular jury was selected in a very routine fashion. All of the prospective jurors were seated in the courtroom. Preliminary remarks and instructions were given. A series of questions was propounded to

the group and then to individuals seated in the jury box. All in the courtoom participated and were in a position to hear the proceedings. As usual, the questioning was more detailed and more personal when directed to those first placed in the box. Of necessity many of the questions were repeated many times, particularly the questions going to the Witherspoon issue. As the proceedings progressed the judge and counsel would refer to questions asked earlier rather than to repeat each again and again. The following extracts illustrated what transpired before Judge John H. Dewell on January 15, 1974, in the County Courthouse, Inverness, Florida.

The trial judge explained to the jury their role in a bifurcated capital trial.

> THE COURT: Now the first count, first degree murder, charges what is under the present law a capital

offense. You may be aware that some time ago the capital punishment law of Florida was declared invalid by the Courts, by the U.S. Supreme Court. Since then the legislature has passed a new capital punishment law in Florida that is, and that law is in effect here today. Now under the new law in the event of a capital crime, such as we have here today, we have what is known as a bifurcated trial. That is a trial will be conducted in two parts.

In the first part the jury will hear the evidence in the case and will determine the guilt or the innocense of the defendant without regard to punishment at all, just determine the guilt or innocence of the charge. In the event the jury should return a verdict of not guilty or guilty of some lesser included offense less than a capital crime, of course, then that is the end of the trial. In the event that the jury should come back with a verdict of guilty of first degree murder, which is the capital offense then would be held by the same jury the second part of the bifurcated trial.

During the second part of the trial the jury would then be allowed to hear additional testimony concerning facts that were

not admissible in consideration of the guilt of innocence. Matters of age or other factors listed in the Statute are mitigating or aggravating factors which could be considered. The jury would then, by a majority vote--now a vote of guilty or innocence must be a unanimous verdict, everyone must agree--but on your second verdict which is known as an advisory sentence the jury by a majority vote would recommend to me as a Court what the proper sentence should be. If they find that the aggravating circumstances are sufficient and they are not outweighed by mitigating circumstances then the proper recommendation would be that the death penalty be imposed. If they find that the mitigating circumstances outweigh any aggravating circumstances, then the recommendation, the verdict should be the advisory sentence should be for life imprisonment.

In either event the final decision is not the jury's. The final decision is rested solely with the Court. It will be my decision in the event of a verdict of guilty of first degree murder it will be my decision to whether or not, my determination alone, as to whether or not this defendant should go to the electric chair. I do want you to understand though that the law intends and I cer-

tainly would give great weight to what the advisory sentence would be. So you should not take your duties lightly. However, I would not be obligated to follow it. The jury might return a recommendation, advisory sentence of the death penalty and I might reduce it to life imprisonment and the jury might recommend life imprisonment and I would feel that they were wrong and sufficiently strongly to go ahead and administer the death penalty anyway. Both have been done in this state under the law, the new law.

Now that is a procedural situation, that is where we stand. I will tell you further in the event of life imprisonment on a capital crime the law provides that the defendant shall serve not less than twenty-five calendar years before he becomes eligible for parole which is contrary to the usual life sentence in any other life sentence the ordinary parole laws would apply.

Now do y'all understand the procedure in a bifurcated trial?

State Transcript Ex. Vol. III at 25-28.

> At this time I went to get off into a different area concerning the capital punishment feature of the case. I have explained to you already the basic procedure. How we have a two section trial and how although the final determination in the event of a verdict of guilty of first degree murder the final determination as to penalty will be mine. But that you, if you are selected on the jury, would be called upon to listen to further testimony and to advise me by advisory sentence.
>
> Now at the time of the submission of the case, should that time ever arrive, you will be instructed by me on the law as to what matters you should consider and what you should not consider and how you should go about in arriving at your advisory sentence. Under certain circumstances if you find the aggravating circumstances are sufficient they are not outweighed by mitigating [sic] then it would be proper under the law your correct verdict would be to recom-

end the death penalty.

Now I am going to ask each of you individually the same question so listen to me carefully, I want to know if any of you have such strong religious, moral or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts presented to you should be such as under the law would require that recommendation? Do you understand my question?

MR. MALONEY: Your Honor, pursuant to the motion I filed beforehand I object to this question. I believe that it is irrelevant to the matter at hand and I think that the discussion of this at this time prejudices the defendant's right to a fair and impartial trial.

THE COURT: All right, sir. Motion will be denied and the objection overruled.

All right, Mrs. Macy do you hold such conscientious moral or religious principles in opposition to the death penalty you would be unwilling under

the circumstances to recommend the death sentence?

MRS. MACY: No, sir.

THE COURT: Do you Mr. Blankenship?

MR. BLANKENSHIP: No, sir.

THE COURT: Mr. Pelellat?

MR. PELELLAT: No, sir.

THE COURT: Mrs. Spike.

MRS. SPIKE: No, sir.

MR. VARNEY: Yes, sir.

THE COURT: You feel then, sir, that even though and I am not saying it will it would be purely speculative in the event that the evidence should be such that under the law that should be the legal recommendation because of your conscientious beliefs?

MR. VARNEY: I believe I would.

THE COURT: All right, sir. You will be excused.

MR. MALONEY: I renew the objection. I do not think he should be challenged for cause.

THE COURT: Yes, sir, the objection will be noted and overruled.

All right, Mr. Varney, you will be excused. Thank you very much for your service.

CLERK: Number 114.

THE COURT: Mrs. Hann, do you hold such strong beliefs that you would be unwilling under any event to return a death sentence:

MRS. HANN: No, sir.

THE COURT: Mr. Waller?

MR. WALLER: No, sir.

THE COURT: Mr. DeMilt?

MR. DeMILT: NO, sir.

THE COURT: Mr. Dorminy?

MR. DORMINY: No, sir.

THE COURT: Mrs. Keck?

MRS. KECK: No, sir.

THE COURT: Mr. Roberts?

MR. ROBERTS: No, sir.

THE COURT: Mr. Mays?

MR. MAYS: Yes. I could not recommend it.

THE COURT: All right.

You will be excused, Mr. Mays, Mr. Maloney, I assume you wish the same objection to apply to him.

MR. MALONEY: Yes, Your honor.

THE COURT: So recorded.

(Mr. Mays was excused from the jury box).

Id. at 42-46

The two prospective jurors that were added to replace those excused were then examined.

THE COURT: Do either of you hold such strong moral or religious conscientious principles in opposition to the imposition of the death penalty that you would be unwilling to recommend the imposition of the death penalty regardless of the evidence?

MR. PURCELL: No.

Mrs. O'BRY: No

Id. at 49.

Mr. McDaniel, assistant state attorney, conducted his examination of the prospective jurors.

Mrs. Keck, did you hear the indictment read, the charges against the defendant?

MRS. KECK: Yes, sir.

Mr. McDANIEL: Merely hearing the indictment understanding he is charged with a capital offense and then robbery and then I believe assault with intent to commit first degree murder are those such horrible crimes that you would rather not sit? Are sitting there--I might be if I were in your position-- saying 'Please don't make me stay. Let me go'? Are you in that position?

MRS. KECK: I don't believe so.

MR. McDANIEL: Mr. Roberts?

MR. ROBERTS: Yes, sir.

MR. McDANIEL: You feel the same way, you don't mind serving on this type of jury?

MR. ROBERTS: No, sir.

MR. McDANIEL: Mr. Purcell, other than your job?

MR.PURCELL: No, I don't mind.

MR. McDANIEL: Mrs. O'Bry?

MRS. O'BRY: No.

MR. McDANIEL: Mrs. Spike?

MRS. SPIKE: No.

MR. McDANIEL: I know I am pronouncing your name wrong.

MR. PELLELLAT: Pellellat.

MR. McDANIEL: You understand what the man is charged with?

MR. PELLELLAT: Yes.

MR. McDANIEL: And you have no objection to sitting on this type of jury?

MR. PELLELLAT: No.

MR. McDANIEL: And Mr. Blankenship?

MR. BLANKENSHIP: No, sir.

MR. McDANIEL: Mrs. Macy?

MRS. MACY: No.

MR. McDANIEL: Mr. Waller?

MR. WALLER: No.

MR. McDANIEL: Mr. DeMilt?

MR. DeMILT: No.

MR. McDANIEL: Mr. Dorminy?

MR. DORMINY: No, sir.

Id. at 52-54

After Mrs. O'Bry, Mr. Waller, and Mr. DeMilt were peremptorily excused three additional prospective jurors were questioned.

THE COURT: Do either of the three of you hold such strong religious, moral or conscientious principles in opposition to the imposition of the death penalty that you would be unwilling to vote to recommend the death penalty regardless of what the evidence was?

MR. CARHUFF: No, sir.

MR. SCHNEIDER: No, sir.

MRS. LUCKER: No, sir.

THE COURT: Do any of you know of any reason good, bad or indifferent whatsoever whether it is a reason or just an excuse why you feel it might be difficult for you to sit here and be fair and impartial in a trial of this case?

MR. CARHUFF: No, sir.

MR. SCHNEIDER: No, sir.

MRS. LUCKER: No, sir.

THE COURT: You feel that you can and you would return a verdict based upon the evidence and the law which would be fair to both the State and to the defendant?

MR. CARHUFF: Yes, sir.

MR. SCHNEIDER: Yes, sir.

MRS. LUCKER: Yes, sir.

Id. at 88-89.

Mr. White, another assistant state attorney also examined the prospective jurors.

> The Judge will instruct you that when you retire to the jury room to consider your verdict you have basically two things that you can look to; the law that this Court gives you and the evidence that comes from that chair right there. Now in everybody's mind in this courtoom today, and I am sure in yours, is the fact that this is a capital crime. Nevertheless would you hold true to your oath as jurors and consider two things in that jury room: the law that this Court gives you and the evidence that comes from that chair and nothing else? Would each of you do that?
>
> Would each of you realize that just because this is a very serious crime, a capital case, the State has no higher burden of proof than it has on any other criminal case?

Id. at 92.

Mr. Roberts, Mrs. Spike, Mr. Purcell and Mrs. Keck were peremptorily excused. After a recess for lunch, the questioning continued for jurors

who replaced those excused.

THE COURT: Ms. Carn, the fact your husband for a while was a police officer and the fact that we have here listed as witnesses many police officers and deputy sheriffs conceivably could raise a little bit of a problem. Do you think that because of your husband's previous occupation that you might be a little inclined to give what the officers say more weight than you would any other witness you didn't know?

MS. CARN: I don't think that I would; but I do not believe in capital punishment.

THE COURT: The question isn't ma'am whether you believe in capital punishment or not; the question is whether or not you have such a strong disbelief in it as to make it unable for you to vote to return a recommendation of the death penalty regardless of what the evidence might be.

MS. CARN: That's right.

THE COURT: All right, ma'am. Then we will excuse you right now. I appreciate your candor.

MR. MALONEY: Your Honor, once again I object. I don't think that is relevant.

THE COURT: Objection will be noted.

(Ms. Carn was excused from the jury box.)

Id. at 106-07.

BY THE COURT: I have asked the others and I will ask each of the four of you whether you have such strong religious, conscientious or moral principles against the imposition of the death penalty that you will be unwilling to vote to return a recommended sentence of the death penalty regardless of what the evidence or the facts might be?

Would you Ms. Pigeon?

MS. PIGEON: Yes, sir.

THE COURT: Mr. Wall?

MR. WALL: No, sir.

THE COURT: How about you, Ms. Maher?

MS. MAHER: Yes, I do have such convictions. I am a Seventh Day Adventist.

THE COURT: And no matter what the evidence showed you don't think you would vote for it?

MS. MAHER: I couldn't, sir.

THE COURT: Very well, over the objections of the defendant she will be excused.

(Ms. Maher was excused from the jury box.)

THE COURT: How about you, Mr. Parker?

MR. PARKER: No.

CLERK: Henry M. Embach. Number 34.

(Mr. Embach, was seated in the

jury box.)

Id. at 109-10.

THE COURT: All right. Mr. Embach, do you have such strong religious or moral or conscientious principles in opposition to the death penalty that no matter what the evidence is you would not be willing to vote to return a verdict?

MR. EMBACH: No, sir.

THE COURT: Recommending it.

MR. EMBACH: No, sir.

THE COURT: Fine, sir.

Now are any of the four of you new prospective jurors, are you conscious of any reason whatsoever why you could not sit as fair and impartial jurors in this case?

Do you know of anything at all in your background?

All right, Mr. State Attorney, you may inquire.

MR. McDANIEL: Thank you, sir.

How many of the jurors work for Florida Power?

I guess some of the ones that are gone must have worked for Florida Power.

Mr. Wall and Mr. Embach, Mr. Parker and Ms. Pigeon, did all of you hear the questions that were asked this morning by both myself, by Mr. Goodwill, by

Mr. Maloney, Mr. White and by Mr. Kovach?

Would any of your answers be substantially different than those answers given by the members now present on the jury?

Any of the questions that I asked or anyone else asked raises any questions in your mind.

You heard the explanation of presumption of innocence by Mr. Goodwill and Mr. Maloney, and, of course, the Court. Each of you heard that explanation.

Can you assure me that this time you can look at the defendant and say to yourself that he is innocent, "I will presume him innocent and require me and Mr. White to prove to you by the evidence from this and that he is guilty beyond a reasonable doubt?

Id. at 112-13.

Mr. Blankenship was peremptorily removed and was replaced by Daniel Lord.

THE COURT: Are you conscious of any reason why you could not sit in this case as a fair and impartial juror?

MR. LORD: No, sir.

THE COURT: Do you have such strong religious or moral or conscientious principles in opposition to the death penalty that you would be unwilling to

recommend, no matter what the facts were, you would be unwilling to recommend the death penalty to the Court?

MR. LORD: No.

THE COURT: All right, Mr. McDaniel, it is your turn.

MR. McDANIEL: Thank you, Your Honor.

Mr. Lord, I think I have approximately one question.

At any time today has there been any question asked by me to any of the jurors, prospective jurors that you think that your answers would have been different than what I wanted, what was responded to by the other jurors?

MR. LORD: No.

MR. McDANIEL: OK.

Id. at 131-32.

Mrs. Pigeon was peremptorily excused and was replaced by Jack Dwayne Hudson.

THE COURT: Do you have such strong principles in opposition to the death penalty under no factual situation would you be willing to vote to recommend to the Court the imposition of the death penalty?

MR. HUDSON: No.

THE COURT: You heard me this morning explain to all of the jurors the principle of presumption of innocence

as applies to this defendant and the requirement of guilt be proved beyond a reasonable doubt before you could convict?

Do you feel that you will be able to accord him these rights?

MR. HUDSON: Yes, sir.

THE COURT: Will you do that, sir?

MR. HUDSON: Yes, sir.

THE COURT: Do you know of any reason why you could not sit in this case as a fair and impartial juror and return a verdict favorable both to the State and to the defendant?

MR. HUDSON: No, sir.

THE COURT: All right, Mr. White.

Id. at 140-41.

Mr. Lord was excused and replaced by Mrs. Helen Mays.

THE COURT: Mrs. Mays, you heard all of the questions today and I imagine you know all of the questions and answers by heard [sic] by now, but I will try you out on your memory.

Are you acquainted with the defendant over here?

MRS. MAYS: No, sir.

THE COURT: Willie Jasper Darden. Have

you heard of him or this case before?

MRS. MAYS: No, sir.

THE COURT: Do you know any lawyers involved or any witnesses?

MRS. MAYS: No, sir.

THE COURT: Do you have any religious, moral or conscientious principles against the death penalty that are so strong that you would be unwilling to vote to recommend the death penalty regardless of what the facts might be?

MRS. MAYS: No, sir.

Id. at 150-51.

THE COURT: Mrs. Mays, do you know anything about this case at all?

MRS. MAYS: No, sir, I don't.

THE COURT: I have been through that. Have I asked you if you have any conscientious beliefs against the death penalty?

MR. MAYS: No.

THE COURT: Do you know of any reason why you couldn't sit as a fair and impartial juror in this case today?

MR. MAYS: No.

Id. at 157.

Mrs. Mays was peremptorily excused

and was replaced by Ronald T. Staha.

THE COURT: Do you have any opinions or principles in opposition to the death penalty that are so strong that it would make it impossible or very difficult for you to vote to recommend a verdict of death sentence regardless of what the facts might be?

MR. STAHA: No, sir. Id. at 160

Mr. Staha was excused and was replaced by Theodore T. Murphy.

THE COURT: Mr. Murphy, what is your occupation?

MR. MURPHY: Retired.

THE COURT: What did you do prior to retirement, sir?

MR. MURPHY: Several jobs. I was eight and half years in the administration office in a seminary, before that I was thirty years with the utilities.

THE COURT: What seminary were you with, sir?

MR. MURPHY: St. Pios, Uniondale, New York.

THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?

MR. MURPHY: Yes, I have.

THE COURT: All right, sir, you will be excused then.

(Mr. Murphy left the jury box.)

CLERK: Cecelia Clark Mulroy. Number 85.

THE COURT: Mrs. Horne you will note the defendant object [sic] to him being excused for cause.

(Mrs. Mulroy was seated in the jury box.)

THE COURT: Mrs. Mulroy, would your answers to the questions that I have been asking the other jurors would be the same as theirs?

MRS. MULROY: Yes, sir.

THE COURT: You know nothing about the case; you don't know the defendant or none of the lawyers.

MRS. MULROY: No.

THE COURT: None of the witnesses.

MRS. MULROY: No, I don't.

THE COURT: If the facts justify it would you have no such principles in opposition to the death penalty that you would be unwilling to vote to recommend the death penalty?

MRS. MULROY: Depending on the evidence.

THE COURT: Yes, ma'am.

Id. at 165-66.

A jury of twelve was accepted and sworn and alternate jurors were questioned.

In my opinion the excusal of Mr, Murphy is supported by this record. The trial judge concluded that Mr. Murphy could not follow the law and would not vote for any verdict that might result in the death sentence regardless of the evidence presented or the facts found. Mr. Murphy had worked "thirty years with the utilities." After this career it appears he worked in the administrative office of the St. Pios Seminary, Uniondale, New York. It would not be unreasonable to draw certain conclusions from these facts above. Mr. Murphy's response to the Witherspoon question is unequivocal. Only the trial judge could evaluate its forcefulness or the manner in which

it was made. Mr. Murphy had heard the same, or similar, question many times that day. He probably knew it was coming and had thought about it long before being seated in the jury box. To suggest that the trial court's ruling was based upon one question and one answer is to ignore reality (and the record of the state court proceedings).

Applying any standard[2] to the ruling in question leads me to the conclusion that Mr. Murphy was properly excused for cause. Most respectfully, I dissent.

FOOTNOTES

1. The habeas petiton in this matter was filed on May 21, 1979. The district court denied relief on May 8, 1981. Notice of appeal was filed on June 9, 1981. Our panel opinion was issued on February 14, 1983. The en banc court considered the case and found itself evenly divided. An appropriate order was entered on July 1, 1983. On petition for rehearing, the en banc court reconsidered the case and now issues this opinion.

2. If "abuse of discretion" is applied as the standard, there is none; if "a close study of the voir dire transcript to determine whether a venireperson was improperly excluded from the jury" is the standard, the majority has in my opinion failed to study this record closely enough; and if "an independent appellate review" means that the court of appeals is going to determine the state of mind of the venireperson involved, we are simply wrong.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIE JASPER DARDEN,

Petitioner,

-vs- CASE NO. 79-566 Civ-T-H

LOUIE L. WAINWRIGHT,
Secretary of Department of
Offender Rehabilitation,
State of Florida,

Respondent.

MEMORANDUM OPINION

Willie Jasper Darden, a Florida prisoner under sentence of death, petitions for a writ of habeas corpus pursuant to 28 USC §2254. His petition was referred to a United States Magistrate who conducted an evidentiary hearing and subsequently rendered a Report and Recommendation that relief be granted on two grounds. The parties filed their respective objections to the Magistrate's Report, and a hearing was then conducted

before me in order to facilitate the de novo determination required by 28 USC §636(b)(1)(B) and (C). See also Rule 6.02 M.D. Fla. Rules, and Rule 8(b)(4), Rules Governing §2254 Cases. Upon full consideration of the Magistrate's Report, the record of the proceedings he conducted and the case in general, I am convinced that the infirmities in the Petitioner's trial do not assume constitutional dimensions and that his petition should be denied.

I Background

Carl's Furniture Store was located in Lakeland, Florida. It was a small retail store dealing in used furniture and household appliances. The business was owned by Mrs. Helen Turman and her husband Carl. Their home was adjacent to the store, and Mrs. Turman managed the business while Mr. Turman held employment elsewhere.

On the evening of September 8, 1973, Mrs. Turman was the victim of an armed robbery in her store. While that crime was in progress Mr. Turman happened to enter upon the scene. He was followed a few minutes later by Phillip Arnold, a teenaged neighbor. What happened next was succinctly described by the Supreme Court of Florida in the following terms:*

> The record shows that Appellant first robbed Mrs. Helen Turman and that, when her unarmed husband Carl started to enter the store, Appellant shot him between the eyes scattering blood and brains. As a sixteen year old boy, Phillip Arnold, tried to aid the wounded man, Appellant shot him in his mouth, neck, and side, leaving permanent injuries, including a bullet still in his neck at time of trial. While her bleeding

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* Darden v. State, 329 So.2d 287, 290 (Fla. 1976). The Magistrate's Report and Recommendation contains a more detailed description of the facts.

> husband lay in a rainstorm at the door, Appellant tried to force Mrs. Turman to commit an unnatural sex act upon him at gun point. She refused, and after shooting the boy Appellant left the area.

Darden was arrested and subsequently indicted for first degree murder (of Mr. Turman), robbery (of Mrs. Turman), and assualt with intent to commit murder (upon Phillip Arnold). Following a change of venue to another county, the trial was held in January, 1974. In addition to circumstantial evidence against him, Darden was positively identified during the trial by Mrs. Turman and Phillip Arnold. His defense was alibi, and he was the sole witness to testify in his behalf.**

**The Petitioner thus gained a procedural advantage afforded by the Florida Rule that ". . .a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury." Rule 3.250, Fla. Rules of Criminal Procedure, 34 F.S.A. 5 (1975).

The jury found the Petitioner guilty as charged; and, following the second phase of the bifurcated trial required by Florida Statute 921.141 - - the constitutionality of which has been settled by Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960 (1976) - - the jury recommended that Darden be sentenced to death. The trial judge then entered his independent findings concerning aggravating and mitigating circumstances, pursuant to the statute, and followed the jury's recommendation by imposing a sentence of death.

An appeal was taken to the Supreme Court of Florida which affirmed the conviction and sentence. Darden v. State, 329 So.2d 287 (Fla. 1976). A petition for a writ of certiorari was granted by the Supreme Court of the United States on November 1, 1976. Darden v. Florida, 429 U.S. 917, 97 S.Ct. 308 (1976). By order entered January 10, 1977, the Court

limited the issues to be considered to the one ". . .dealing with whether the prosecution's summation to the jury in the circumstances of this case deprived the petitioner of due process of law." 429 U.S. 1036, 97 S.Ct. 729 (1977). Thereafter, on April 19, 1977, following oral argument, the Court entered an order dismissing the writ of certiorari "as improvidently granted." 420 U.S. 704, 97 S.Ct. 1671 (1977). The Petitioner then returned to the State Courts* and, ultimately, to this Court seeking habeas relief after the Governor had issued a death warrant.

The Magistrate's Report recites twenty-five constitutional claims being asserted by the Petitioner, but only two were found to have merit: (1) the claim

*No issue is raised concerning exhaustion of state remedies, pursuant to 28 USC §2254, with respect to any of the issues articulated in the Magistrate's report.

concerning the prosecution's closing argument; and (2) the claim concerning Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968).

II The Prosecution's Closing Argument

(a) The Supreme Court's grant of certiorari. The principal issue raised during the Petitioner's direct appeal from his conviction - - or, at least, the principal issue addressed by the Supreme Court of Florida in disposing of that appeal - - concerned the inflammatory nature of the prosecution's closing argument to the jury at trial; and, as previously noted, the Supreme Court of the United States initially granted certiorari to consider that very issue. The writ was then discharged, after oral argument, as having been improvidently granted. The Magistrate did not consider or discuss the effect of the Supreme Court proceeding and the parties have

cited no authority on that point.

It is a well known rule, of course, that denial of a petition for a writ of certiorari by the Supreme Court does not constitute an adjudication.* But does the same result obtain upon collateral proceedings in the same case when certiorari to review a precisely articulated issue has been granted, not denied, and the writ is then subsequently discharged after oral argument? One might well suppose, at least with respect to the parties in such a case, that the discharge of the writ constituted a sufficient adjudication to preclude relitigation of that issue in collateral proceedings under 28 USC § 2254 unless the order discharging the writ expressly preserved the question. See, for example, Smith v. Mississippi,

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*Brown v. Allen, 344 U.S. 443, 489-497, 73 S.Ct. 397, 437-441 (1953).

373 U.S. 238, 239, 83 S.Ct. 1265, 1266 (1963), in which the order discharging a writ previously granted specifically provided that such disposition was "without prejudice to an application for federal habeas corpus relief under 28 USC §2241 after exhaustion of any state remedies still open . . ." C.f., Shippy v. Estelle, ____U.S.____, 99 S.Ct. 1519 (1979), and Jurek v. Estelle, 430 U.S. 951, 97 S.Ct. 1592 (1977), in which mere denials of petitions for certiorari contained similar provisions concerning habeas relief.

It does not appear, however, that the Supreme Court has delineated any distinction between the adjudicative effect of a denial and a discharge of a writ of certiorari; and, indeed, in at least one decision the Court declared that the two forms of disposition have the same inconclusive result. Hughes Tool Company v. Trans World Airlines, Inc., 409 U.S. 363,

365, 93 S.Ct. 647, 650 n.1 (1973). See also, Miller v. Carter, 434 F.2d 824 (9th Cir. 1970), cert. denied, 402 U.S. 972, 91 S.Ct. 1658 (1971). Accordingly, until the Supreme Court holds otherwise, this Court cannot dispose of the claim concerning the prosecutor's closing argument on the ground of a prior federal adjudication inherent in the Supreme Court's discharge of a writ previously issued to consider that claim.

(b) Wainwright v. Sykes and the lack of contemporaneous objection. There is a second preliminary issue which must be resolved before the constitutional propriety of the prosecutor's argument can be considered on its merits. The State contends, pursuant to the decision in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977), that the Petitioner waived and is now precluded from asserting the claim because he did not make a timely

objection during the trial as necessitated by Florida's contemporaneous objection requirement, and he has not demonstrated "cause" and "prejudice" with respect to that failure. There is, however, an established exception to this application of Wainwright v. Sykes. When the State Court does not rely upon or enforce its contemporaneous objection requirement as a waiver, and proceeds to adjudicate the claim on its merits, then the federal habeas court should also reach and decide the constitutional issue presented. Moran v. Estelle, 607 F.2d 1140, 1141-42 (5th Cir. 1979); Thompson v. Estelle, ___ F.2d ___ (No. 80-1329, Slip Op. p. 6062, 5th Cir., April 17, 1981). See also, County Court of Ulster County v. Allen, ___ U.S. ___, 99 S.Ct. 2213 (1979).

The difficulty presented by this case arises from the fact that the

Supreme Court of Florida apparently disposed of the Petitioner's direct appeal on both grounds, alternatively. It first confronted and decided the fair trial issue concerning the prosecutor's argument, and then held, in the final paragraph of its opinion, that the lack of contemporaneous objection afforded an "additional" basis for denying relief, citing by footnote reference its decision in State v. Jones, 204 So.2d 515 (Fla. 1967).*

Ratcliff v. Estelle, 597 F.2d 474 (5th Cir. 1979), cert. denied, 444 U.S. 868, 100 S.Ct. 143 (1979), presented a

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*The final paragraph of the Darden opinion stated (329 So.2d at 291):

> Additionally, Appellant admits that his attorney voiced but a single objection to the prosecutor's closing arguments, that it was not directed to any of the allegedly inflammatory matter, and that his attorney waited until the fifth occasion to

footnote continued

> object at all. This Court was held that a prosecutor's challenged argument will be reviewed on appeal only when a timely objection is made.4

In State v. Jones, a 1967 decision cited in footnote 4, the Court "recanted" an exception under which improper prosecutorial argument had been reviewed on appeal in some prior cases despite the lack of objection, and held that "... henceforth [the Court] will review challenged argument of prosecutors only when an objection is timely made." 204 So.2d at 519.

a similar problem. The underlying issue concerned the petitioner's claim that blacks had been systematically excluded from the grand jury which indicted him. He had not objected at the time of trial and first raised the issue in post-conviction habeas proceedings in the state courts. The state trial Court held that the claim had been waived by failure to make timely objection, but also held, secondarily, that the claim lacked merit in any event. On appeal of that decision

the state court of appeal merely adopted the order of the trial Court. The federal district court then denied a §2254 petition and the case made its way to the Fifth Circuit. The Court of Appeals began its opinion by postulating the issue as follows (597 F.2d at 475-476):

> If a state court finds that a procedural default forecloses a convicted defendant's right to challenge collaterally the composition of the grand jury which indicted him, but then proceeds to consider and deny the challenge on the merits, must a federal court deny habeas corpus relief under the contemporaneous objection rule, without reaching the merits of the constitutional attack? We agree with the district court that it must.

If that resolution of the problem constituted the entirety of the Fifth Circuit's decision it would clearly be dispositive of this case; but the reasons given later in the Court's opinion cast doubt upon that conclusion. The Court said (597

F.2d at 478):

> Without written order the Texas Court of Criminal Appeals denied petitioner's application based on the findings of the trial court.
>
> It is fair to assume that the appellate court applied the procedural default rule. First, the language in the trial court opinion regarding procedural default is absolute and there is no subsequent language which would qualify or compromise it. Second it is well settled that a court will not reach a constitutional question if it can rest its decision on nonconstitutional grounds. Third, there is no question that the trial court correctly applied Texas law on the procedural issue.
>
> Having decided here that the state court applied its procedural default rule and did so correctly, the federal courts must abide by that decision, cause for failure to object and actual prejudice not having been shown. The district court's dismissal of the petition for habeas corpus relief on the grand jury issue must, therefore, be affirmed. (Emphasis supplied).

Given the sequential organization of the state trial court decision placing the

procedural waiver first-in-time as the primary basis of the ruling, the emphasized portion of the foregoing passage from the Court of Appeals opinion seems to indulge a presumption that the state court of appeals was content to dispose of the case on the procedural ground without reaching the issue on its merits. Hence, if that is a correct reading of the Fifth Circuit's opinion in Ratcliff, then the broad sweep of the first paragraph of the opinion must be restricted to the particular facts of the case, and when so restricted the decision is not dispositive of this case. Here, as contrasted with the situation in Ratcliff, the state court decision was rendered by the Supreme Court of Florida, the state's highest court, which clearly entertained and determined the fair trial issue on the merits as the primary basis of its decision, and the procedural

waiver rationale was a secondary and alternative basis of disposition. Under those circumstances, therefore, while the Court of Appeals may ultimately decide that Ratcliff applies and that the Petitioner's claim concerning the prosecution's closing argument should be dismissed pursuant to Wainwright v. Sykes due to the lack of contemporaneous objection at trial, it behooves this court to consider the claim on its merits.

(c) The merits of the claim. At all stages of this proceeding the State has candidly asserted that "no one has ever even weakly suggested that [the prosecutor's] closing remarks were anything but improper. . ."* And indeed they were. However, the question

*Respondent's Supplemental Answer quoted at page 9 of the Magistrate's Report and Recommendation.

now to be decided is whether their probable impact upon the jury was such as to deny the Petitioner his constitutional right to due process of law by affording a trial that was fundamentally unfair. Whether an appellate court on direct appeal would ordinarily reverse a conviction under these circumstances in order to deter prosecutorial misbehavior in general and assure a fair or fairer trial is not the issue. Donnelly v. DeChristoforo, 416 U.S. 637, 642-643, 94 S.Ct. 1868, 1871 (1974); Cobb v. Wainwright, 609 F.2d 754 (5th Cir. 1980).*

The improper portions of the prosecutor's arguments may be grouped into

*The Magistrate in his Report and Recommendation began his discussion of the issue by recognizing this important distinction (page 14), but some of the decisions he subsequently cited were rendered in direct appeals, and his analysis employed such terms as "prejudicial error" (page 17) and "prejudicial or reversible error" (page 18).

four separate categories: (1) references to the state's Division of Corrections; (2) references to the Petitioner as an "animal"; (3) expression of personal opinion as to the Petitioner's guilt; and (4) other remarks of an inflammatory nature. It is fundamental, however, that any assessment of the effect of improper argument must be made by viewing the argument as a whole and in the context of the entire case. Cobb v. Wainwright, supra. In this instance, for example, it is crucial to remember that the defense gained, and exercised, the right to open and close the arguments or summations to the jury - - the reverse of the usual sequence of argument so familiar in the federal system. This is important for two reasons. First, as will be seen, much of the prosecutor's diatribe was responsive to the opening argument of

the defense; and, secondly, the defense had the "last word" in making rebuttal argument.

In the opening portion of his argument to the jury defense counsel** employed a common defensive technique and spoke at length concerning the lack of evidence, i.e., the abasence of fingerprints or photographs of the murderer's tire tracks; and, in the jargon of trial lawyers, he generally "put the sheriff on trial." Indeed, at the conclusion of that line of argument counsel said:

> The Judge is going to tell you to consider the evidence. We have a lack of evidence, almost criminally negligent on the part of the Polk County Sheriff's Office in this case. You could go on and on about it. (Emphasis supplied).

** The Petitioner was represented by two lawyers throughout the trial. One of them made the opening summation and the other presented the rebuttal argument.

Under those circumstances it should come as no surprise that the prosecutor attacked that theme of the defense summation at the very beginning of his argument. He said:

> Now [defense counsel] and I am positive and I assure you and I guarantee you that [other defense counsel on rebuttal] will try the Polk County Sheriff's Office; he will try the Polk County Sheriff's Office; and he will try me. And he will try [my co-counsel]. I guarantee that, because he has notes I gave him many years ago.
>
> But let me tell you something. As far as I am concerned, there should be another Defendant in this courtroom, one more, and that is the division of corrections, the prisons. As far as I am concerned, and as [defense counsel] said as he identified this man, this person as an animal, this animal was on the public for one reason. Because the division of corrections turned him loose, lets him out, lets him out on the public. Can we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?

The prosecutor's references to the Division of Corrections were occasioned by the fact, as disclosed by the evidence, that the Petitioner was a convicted felon on weekend furlough from the state prison system at the time of the Turman murder; and the thrust of the prosecutor's opening tirade against the prison authorities was repeated from time to time as his argument progressed.* It is apparent in reading the arguments in their entirety, however, that the

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* "I wish that person or persons responsible for him on the public was in the doorway instead of [the murder victim]. I pray that the person responsible for it would have been in that doorway and any other prson responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of [Phillip Arnold]. Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them.

* * *

footnote continued

Mr. Turman is dead because that unknown defendant we don't have in the courtroom allowed it. He is criminally negligent for allowing it.

* * *

There is one person on trial, not the Polk County Sheriff's Office, not the Hillsborough Sheriff's Office, but he and his keepers, the Division of Corrections.

* * *

I cannot help but wish that the Division of Corrections was sitting in the chair with him [the defendant]. Thank you."

prosecutor had a dual purpose in mind when he attacked the Division of Corrections. Not only was he shifting the jury's focus away from the sheriff's office - - where the defense had sought to fix it - - he was also making, in effect, his principal argument in support of the death penalty.** This too had

**This conclusion is buttressed by the fact that, at the conclusion of the penalty phase of the trial, the prose-

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cutor's argument to the jury is contained on a single page of the transcript. He said only that the prosecution was seeking the death penalty and he exhorted the jury to be attentive to the instructions of the Court. It is also pertinent to note that the first "aggravating circumstances" enumerated in Florida Statute 921.141(5), as explained to the jury by the trial judge, is:

> "(a) The capital felony was committed by a person under sentence of imprisonment."

been invited by the defense. On two occasions during his opening summation defense counsel made explicit reference to the death penalty. He first remarked: "And they [the prosecutors] are asking you to kill a man on coincidence." There was immediate objection, but it was overruled. Then, at the very end of his argument, defense counsel said:

> Because, there is so much doubt here, so much unanswered with no attempt to get the answers, that you people have got to walk back in that room and ask yourselves why, why

> not, why didn't they give us something to work with here instead of coincidence and two people in shock. But they didn't bother to. They didn't bother, the Polk County Sheriff's Office didn't find it necessary.
>
> So they come on up here and ask Citrus County people to kill the man. You will be be instructed on lesser included offenses. I think that you will find it rather boring. The question is, do they have enough evidence to kill that man, enough evidence? And I honestly do not think they do. Thank you for your time. (Emphasis supplied).

The second category of objectionable remarks made by the prosecutor involves two references to the Petitioner as an "animal." The first of those references was made near the beginning of the prosecutor's argument and is contained in the quotation on page 10, supra. The second use of the term "animal" by the prosecutor occurred in the following passage:

Some of the remarks I heard in the opening argument by [defense counsel] that I want to remember I disagree with, with his interpretation of the law. You take the law from the Judge. He said that we are asking you to kill this man on this evidence.

Well, he is wrong, of course. I think he knows he is wrong. The Court will tell you at the end of the argument in the Jury instructions at this point, you are merely to determine his innocence or guilt, nothing else, whether he is guilty or innocent. And after you return that verdict of guilty of first degree murder, robbery, and assault with intent to commit murder, the Court will impose a sentence on Count No. 2 and 3, which is robbery and assault with intent to murder, and then you will be asked at that time to go back and retire and advise the Court whether or not he gets the death sentence or whether he should get life.

That is an advisory opinion on your part, and it has nothing to do with this trial, and [defense counsel] knows that. But I am sure that I want you to remember [defense counsel's] opening statement, opening argument when he called this person an animal. Remember that, because I will guarantee you I

will ask for the death. There is no question about it.

As is manifest from that excerpt, defense counsel had first used the term "animal," and he did so not once but twice during his argument, first near the beginning and, second, near the end of his oration:*

> I intend to just briefly summarize the evidence that has been before you. I'm going to attempt to be as objective as possible. The first witness that you saw was Mrs. Turman, who was a pathetic figure; who worked and struggled all of her life to build what little she had, the little furniture store; and a woman who was robbed, sexually assaulted, and then had her husband slaughtered before her eyes, by what would have to be a vicious animal. (Emphasis supplied).

*Defense counsel obviously employed the term "animal" in order to disavow any contention by the defense that the crimes committed were anything other than a vicious series of events, and to demonstrate empathy with Mrs. Turman thereby enabling counsel, and the jury, to focus dispassionate attention upon the issue concerning the Petitioner's identity as the alleged perpetrator of the crime.

* * *

> And this murderer ran after him, aimed again, and this poor kid with half his brains blown away. Fires away, again hits him in the back, and he keeps on running. Mrs. Hill said he ran 500 yards before he collapsed in front of her house. It's the work of an animal, there's no doubt about it.
>
> But what about Phillip's identification? Under those circumstances, do you think it is really gotten [sic] good identification? No, it was dark. The man - - Phillip Arnold, 16 years old. (Emphasis supplied).

A third challenge of the prosecutor's jury argument relates to his blatant expression of a personal opinion concerning the guilt of the accused:

> I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life.

Anyone attempting a text-book illust-

ration of a violation of the Code of Professional Responsibility, Canon 7, EC 7-24 and DR 7-106(4), could not possibly improve upon that example. Here again, however, the expression of opinion by the prosecutor merely returned a blow already struck not once but twice by defense counsel during his argument. He had said:

> [The Petitioner] was at a preliminary hearing. There were no other black men in the room. Just a question of a woman [Mrs. Turman] admittedly in shock being brought in for a ridiculous legal formality, with her sister to keep her from breaking down to get her there, bring her in, put her on the stand, and say, is this the man? Is she going to say no? I don't think she would. The only black man she knew and so from that preliminary hearing we get to this trial and on that identification, which I think could easily have been mistaken, because of the circumstances surrounding it. And go so far as to say, in my opinion, the identification was mistaken. (Emphasis supplied).
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> * * *

> The question is, do they have enough evidence to kill that man, enough evidence? And I honestly do not think they do. Thank you for your time (Emphasis supplied).

Fourth, and finally, the prosecutor made a series of utterly tasteless and repulsive remarks such as these:

> Mr. Turman, not knowing anything happened, not knowing what was going on. I wish he had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him sitting here with no face, blown away by a shotgun, but he didn't. He had no gun. He had no chance.
>
> * * *
>
> . . . remember her testimony that he unzipped his pants, takes it out and tells the poor woman sitting on the floor to take her teeth out. I wish someone had walked in the back door and blown his head off at that point.
>
> * * *
>
> That's the bullet that went in his brain. That's the one that killed Turman, right there. That's the one that clicked in the boy's face. That's the one that shot him in the mouth. That's the one that shot him in

> the neck. That's the one that shot him in the back. And Mr. Darden saved one. Again, I wish he had used it on himself.
>
> * * *
>
> He didn't go to the hospital, went on to his girl friend's. He testified all this blood dripping down. I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time.
>
> * * *
>
> Don't forget, please, about when [defense counsel] gets into five foot six and five foot eight, 185 pounds, 200 pounds, don't forget what he has done according to those witnesses, to make every attempt to change his appearance from September the 8th, 1973. The hair, the goatee, even the mustache and the weight. The only thing he hasn't done that I know of is cut his throat.

While these pointless remarks were by no means invited by defense counsel in the manner of those previously discussed, it is significant that defense counsel did have the opportunity during rebuttal to respond to them and - - on balance - -

to turn them against the prosecution.*

Counsel argued:

> I, of course, ask you to acquit my client. That's no big surprise, but I ask you another thing, and that is, through being harangued and yelled at, and had a man storm around the courtroom and slap the paper to be demonstrative, don't let him embarrass you into a verdict. Reach the verdict on the evidence.
>
> * * *
>
> Let's go back to the cross-examination of Mr. Darden for a minute. You didn't see the yelling and screaming and righteous indignation and get up and blow your face off. You didn't see that then. . . .

*The vitriolic remarks of a prosecutor can be "prejudicial" to an accused only if they tend to evoke some sympathy or other passion or prejudice on the part of the jury in favor of the state or, perhaps, the victim of the crime, and against the defendant. It is difficult if not impossible to see how any of the offensive comments in this instance could do anything but alienate the jury and weaken the state's case. They were certainly not calculated to engender undue sympathy for the victims nor were they keyed to arouse prejudice against the accused on any basis other than the horror of the crimes themselves.

> Why no righteous indignation at that point? If the man felt that strongly about it, how could he even get up there and examine him? But you saw him stand right over here in this courtroom, and this podium was right over here, and he just coolly and calmly went through it. . . .
>
> Why, when you have the Defendant on the stand and the opportunity to put him through with the most serious, grueling cross-examination with the intent of breaking him down, you see the yelling and the screaming and the pushing and the shoving and the hitting with the stick and the whole works. . . .
>
> Well, the possibility is that he was telling the truth and the State didn't have anything to disprove it. If they had something to disprove that statement it would have been on that stand, and you did not hear it.

Before turning to a review of the applicable authorities there are two other points to be made concerning the effect of the prosecutor's argument. First, the trial judge carefully instructed the jury on two different occasions* that the

*R. 185-186; 713-714.

arguments of counsel were not evidence; and, second, the improper argument proceeded without objection until a point very near the end of the prosecutor's oration.*

As noted earlier, the leading authority concerning the evaluation of allegedly improper argument upon collateral review in habeas corpus proceedings is Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868 (1974). The Court in that decision took care to distinguish such a case from those "in which the State has

*Although the objection then made was overruled it is pertinent to note that the prosecutor avoided objectional rhetoric from that point on in his argument. Also, with respect to the Court's overruling the objection, the phrasing selected by defense counsel in stating his objection was: "I wish the Court would instruct [the prosecutor] to stick with what little evidence he has." The prosecutor responded: "You don't have any evidence yourself. . ." And the Court said: "All right, gentlemen. Proceed with your argument. Objection will be overruled." Obviously, given that exchange, if the judge had sustained the

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objection as stated it would be tantamount to making a direct comment on the strength or weakness of the state's case. By rebuking counsel and directing that the argument proceed the judge did about all he could do at that particular moment.

denied a defendant the benefit of a specific provision of the Bill of Rights. . ." (416 U.S. at 643, 94 S.Ct. at 1871), and also pointed out that "not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice'" (416 U.S. at 642, 94 S.Ct. at 1871). More particularly, the Court specifically distinguished Miller v. Pate and Brady v. Maryland* because the prosecutorial misbehavior in both of those cases involved

*Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785 (1967); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963).

manipulation of the evidence as well as abuses during argument or summation; and it concluded its discussion with the following observations (416 U.S. at 645, 647-649, 94 S.Ct. 1872, 1873):

> Although the process of constitutional line drawing in this regard is necessarily imprecise, we simply do not believe that this incident made respondent's trial so fundamentally unfair as to deny him due process.
>
> * * *
>
> The result reached by the Court of Appeals in this case leaves virtually meaningless the distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct held in Miller and Brady, supra, to amount to a denial of constitutional due process.

Since Donnelly v. DeChristoforo was decided in 1974 there have been three decisions in the Courts of Appeals in which it was determined that a writ of habeas corpus should issue in favor of a state prisoner because of improper prosecutorial

argument to the jury at trial. Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978); Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978); Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975). See also, U.S. ex rel. Haynes v. McKendrick, 481 F.2d 152 (2d Cir. 1973). In each of those cases, however, except Houston, the prosecutor made a direct appeal to racial prejudice; and such decisions are clearly distinguishable on that basis.

Houston, which also happens to be a Fifth Circuit decision, is the only Court of Appeals opinion granting habeas relief on the basis of prejudicial prosecutorial argument concerning matters other than race. The petitioner in that case had been charged in the Texas courts with the offense of possessing heroin. During summations the prosecutor first chided the defense about making objections and then repeatedly argued - - even after the court

had sustained objection - - that the petitioner was in fact a dealer or pusher of heroin. Thus, with the defense restrained from making objections for fear of appearing to obstruct the proceedings, the prosecutor merely accelerated his attack. Moreover, in addition to the argument which effectively misstated and manipulated the evidence, i.e., that the defendant was a dealer when the charge was simple possession, the prosecutor also committed all of the sins of the prosecution in this case as well as some not present in this record - - vouching for the credibility of prosecution witnesses while branding defense witnesses as liars; characterizing defense counsel as hypocrites; making offensive remarks about the sentencing process; attempting to associate the defendant with spectators and implying threats of violence against the jury. The facts of Houston simply stand apart as

Judge Goldberg declared in his universally eloquent style (569 F.2d at 382-383).

Two other recent decisions of the Fifth Circuit are much more similar to the facts of this case, and they point the way to a proper disposition. Cronnon v. Alabama, 587 F.2d 246 (5th Cir. 1979), cert. denied, 440 U.S. 974, 99 S.Ct. 1542 (1979), and Cobb v. Wainwright, 609 F.2d 754 (5th Cir. 1980). Cronnon is particularly apt. In a state court murder trial the prosecutor referred to the defendant as a "fiendish ghoul;" he spoke of the assailant's desire to hear the "squish" of the victim's blood; he suggested that, unless convicted, the defendant would kill again; he called the defendant a liar and asserted that he, the prosecutor, would also lie if he was accused under similar circumstances; he exhorted the jury to place themselves in the shoes of the murdered teenager's parents; and, as in this case,

the entire diatribe was delivered without objection. The Court (Judge Rubin concurring by separate opinion) denied the writ. The opinion in Cobb does not disclose in detail the nature of the prosecutor's challenged argument (other than apparent references to the Bible); but it is particularly instructive with respect to the view of the Circuit concerning the application of Donnelly v. DeChristoforo. The Court said (609 F.2d at 755-756):

> There is no question that the prosecutor in this case made an inflammatory argument. If the trial had been held in federal district court a number of his comments would have constituted more than adequate grounds for a mistrial. In a 28 U.S.C. § 2254 proceeding, however, the scope of review is a narrow one. The Supreme Court only recently ruled in Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), a case also involving charges of prejudicial prosecutorial comment, that not every trial error or infirmity which might on direct appeal call for application of supervisory powers correspondingly constitutes the denial of due process necessary to support a

> grant of relief under 28 U.S.C. § 2254. . . .Unless a specific guarantee of the Bill of Rights is involved, it must be shown that the remarks were so prejudicial that they rendered the trial in question fundamentally unfair. 416 U.S. at 643, 94 S.Ct. at 1868. Here the claim is simply that the prosecutor's remarks so infected the trial with unfairness as to make the conviction a denial of due process.
>
> Given the circumstances of this case, we conclude, and our conclusion is made easier by the strength of the evidence against Cobb, that no prejudice amounting to such a denial of constitutional due process was shown. Unlike Houston v. Estelle, 569 F.2d 372, 376-84 (5th Cir. 1978), a Section 2254 proceeding in which we did reverse a conviction for prosecutorial misconduct, this is not a case in which the prosecutor attempted to mislead the jury with allusions to nonexistent evidence. See also United States v. Herberman, 583 F.2d 222, 229-30 (5th Cir. 1978). Nor is this a case, as was Houston, in which the prosecutor had the last word. Here the prosecutor's argument was followed by two final defense arguments, one of which was made by Cobb's attorney on Cobb's behalf.

In this instance the Supreme Court of Florida thoroughly reviewed the issue

and concluded that "although the prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility, in this particular case they amount to harmless error when the totality of the record is considered in these uniquely vicious crimes." Darden v. State, 329 So.2d 287, 290 (Fla. 1976). The Supreme Court of the United States has recently reminded us that this determination is entitled to great deference pursuant to 28 USC §2254(d), at least to the extent it involves a factual determination. Sumner v. Mata, ____ U.S.____, 101 S.Ct. 764 (1981). Moreover, upon an equally thorough review of the record (in search of constitutional infringement, not "reversible error"), I am also convinced that no relief is warranted. The prosecutor's argument did not involve a manipulation or misstatement of the evidence nor did it implicate other specific

rights of the accused such as the right to counsel or the right to remain silent; most of the objectional content was invited by or was responsive to the opening summation of the defense; the Court instructed the jury on two occasions that the argument of counsel was to be made on the basis of the evidence alone; the challenged argument was presented without objection;* the defense had the "last word" through the presentation of rebuttal argument; and the weight of the evidence against the Petitioner was heavy; indeed, the Supreme Court of Florida said there "was overwhelming eyewitness and circumstantial

*Lead defense counsel testified during the evidentiary hearing before the Magistrate that he deliberately withheld objection because he thought the argument might place error in the record which an objection would only serve to cure (T. 333-334). He also said (T. 365-366) that in his view the prosecutor's argument did not address the issues and "was almost an indictment of the jury." See footnote, supra, page 15.

evidence to support a finding of guilt on all charges. . ." (329 So.2d at 291). Darden's trial was not perfect - - few are - - but neither was it fundamentally unfair.

III Witherspoon vs. Illinois

(a) Is the issue presented? The state vociferously argues that the Magistrate "fabricated" the Witherspoon issue which was never presented by the Petitioner or, if presented, was abandoned because it was not argued in the briefs. This contention is utterly without merit. During the course of the proceedings before the Magistrate the Respondent was granted leave to propound written interrogatories to the Petitioner. Interrogatory No. 3 requested an enumeration of all of Petitioner's claims which might present grounds for relief under 28 USC §2254. On September 7, 1979, the Petitioner filed a supplemental answer to that interroga-

tory which stated, in paragraphs 19 and 20, contentions which can only be read as asserting a cliam under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968); and, on September 14, 1979, the parties jointly filed an amendment to their earlier pre-trial stipulation in which they incorporated all of the claims asserted in the supplemental answer to the interrogatory, and further provided that those claims should be decided on a review of the record with no additional evidence to be presented at the hearing. The Magistrate properly considered those claims. It would have been error not to do so.

(b) The merits of the claim. It is unnecessary to engage in any detailed analysis of Witherspoon or the line of Supreme Court decisions flowing after it because Judge Gee, speaking for the Fifth Circuit in Burns v. Estelle, 592 F.2d 1297, 1300 (5th Cir. 1979), approved en banc,

626 F.2d 396 (1980), fully reviewed and then summarized the development of the law:

> And so our survey of ruling Supreme Court law in the area is complete. It may be summarized:
>
> 1. Only the most extreme and compelling prejudice against the death penalty, perhaps only or very nearly a resolve to vote against it blindly and in all circumstances, is cause to exclude a juror on Witherspoon grounds. A mere disbelief in it, or even 'conscientious or religious scruples against its infliction' will not suffice, since many people hold such views and some of these may yet be able to overcome them and abide by the law.
>
> 2. No jury from which even one person has been excused on broader Witherspoon-type grounds than these may impose a death penalty or sit in a case where it may be imposed, regardless of whether an available peremptory challenge might have reached him.

In this instance, during the voir dire examination of the jury panel, a total of five prospective jurors were excused for cause due to their expressed opposition to capital punishment. The Magistrate concluded, as to two of the

five, that a Witherspoon violation occurred. To evaluate that conclusion it will be necessary to review and quote from the trial record at some length.

It should first be observed that the trial judge was fully conscious of the existence of the Witherspoon decision. That is clear because the record discloses a specific pre-trial discussion of the case. Defense counsel made a motion to exclude any examination of prospective jurors concerning their attitude about the death penalty because of the bifurcation of that issue, citing Witherspoon; but the trial judge ruled, quite properly, that the same jury would then consider the issue of punishment. The Court also remarked (R. 18):

> It is my ruling if a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief he would be unwilling to recommend a death penalty, even though the facts

> and circumstances meet the requirements of law, then he in effect has said he would be unwilling to follow the law the court shall charge upon it and disregard and be unwilling to follow it or if he did follow it, it would be going against his principles, and, therefore, I would rule that would be disqualification. If that exists, I intend to disqualify for cause. (Emphasis supplied).

The court then called the case for trial and began the voir dire examination of the jury panel. During the course of that examination five prospective jurors were excused for cause due to the responses they gave to the judge's Witherspoon questions. It necessary to quote in their proper sequence seven segments of the voir dire examination during which Witherspoon questions were propounded and the subject jurors were excused.* The first segment includes the court's general explanation to the panel as a whole concerning the purpose and intent of the Witherspoon

*R. 42-46; 49; 88; 106-107; 109-110; 151; 165. All emphasis supplied.

examination followed immediately by the specific questioning which resulted in the excusal of prospective jurors Varney and Mays. The remaining sequential quotations reveal the court's questioning of other jurors down through the examination and excusal of juror Murphy, the last to be excused for cause.

> [The court] At this time I want to get off into a different area concerning the capital punishment feature of the case. I have explained to you already the basic procedure. How we have a two section trial and how although the final determination in the event of a verdict of guilty of first degree murder the final determination as to the penalty will be mine. But that you, if you are selected on the jury, would be called upon to listen to further testimony and to advise me by advisory sentence.
>
> Now at the time of the submission of the case, should that time ever arrive, you will be instructed by me on the law as to what matters you should consider and what you should not consider and how you should go about in arriving at your advisory sentence. Under certain circumstances

if you find the aggravating circumstances are sufficient they are not outweighed by mitigating then it would be proper under the law your correct verdict would be to recommend the death penalty.

Now I am going to ask each of you individually the same question so listen to me carefully, I want to know if any of you have such strong religious, moral or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts presented to you should be such as under the law would require that recommendation? Do you understand my question?. . .

All right, Mrs. Macy, do you hold such conscientious moral or religious principles in opposition to the death penalty you would be unwilling under any circumstances to recommend the death sentence?

MRS. MACY: No, sir.

THE COURT: Do you, Mr. Blankenship?

MR. BLANKENSHIP: No, sir.

THE COURT: Mr. Pelellat?

MR. PELELLAT: No, sir.

THE COURT: Mrs. Spike.

MRS. SPIKE: No, sir.

MR. VARNEY: Yes, sir.

THE COURT: You feel then, sir, that even though and I am not saying it will it would be purely speculative, in the event that the evidence should be such that under the law that should be the legal recommendation you would be unwilling to return such a recommendation because of your conscientious beliefs?

MR. VARNEY: I believe I would.

THE COURT: All right, sir. You will be excused.

MR. MALONEY: I renew the objection. I do not think he should be challenged for cause.

THE COURT: Yes, sir, the objection will be noted and overruled.

All right, Mr. Varney, you will be excused. Thank you very much for your service.

CLERK: Debora Ratley.

(Ms. Ratley was seated in the jury box.)

CLERK: Number 114.

THE COURT: Mrs. Hann, do you hold such strong conscientious moral or religious beliefs that you would be unwilling under any event to return a death sentence?

MRS. HANN: No, sir.

THE COURT: Mr. Waller?

MR. WALLER: No, Sir.

THE COURT: Mr. DeMilt?

MR. DeMILT: No, Sir.

THE COURT: Mr. Dorminy?

MR. DORMINY: No, sir.

THE COURT: Mrs. Keck?

MRS. KECK: No, sir.

THE COURT: Mr. Roberts?

MR. ROBERTS: No. sir.

THE COURT: MR. Mays?

MR. MAYS: Yes. I could not recommend it.

THE COURT: All right.

You will be excused, Mr. Mays. Mr. Malone, I assume you wish the same objection to apply to him.

MR. MALONEY: Yes, Your Honor.

THE COURT: So recorded.

* * * * *

THE COURT; Do either of you know of any reason why you couldn't sit as a fair and

impartial jurors in this case?

MR. PURCELL: No.

MRS. O'BRY: No.

THE COURT: Do either of you hold such strong moral or religious conscientious principles in opposition to the imposition of the death penalty that you would be unwilling to recommend the imposition of the death penalty regardless of the evidence?

MR. PURCELL: No.

MRS. O'BRY: No.

THE COURT: All right, Mr. McDaniel, if you are going to conduct the examination for the State you may inquire.

* * * * *

THE COURT: And will you require the State to prove his guilt beyond every reasonable doubt as I have defined reasonable doubt to you?

MR. CARHUFF: Yes, sir.

MR. SCHNEIDER: Yes, sir.

MRS. LUCKER: Yes, sir.

THE COURT: Do either of the three of you hold such strong religious, moral or conscientious principles in opposition

to the imposition of the death penalty that you would be unwilling to vote to recommend the death penalty regardless of what the evidence was?

MR. CARHUFF: No, sir.

MR. SCHNEIDER: No, sir.

MRS. LUCKER: No, sir.

* * * * *

[The court] Ms. Carn, the fact your husband for a while was a police officer and the fact that we have here listed as witnesses many police officers and deputy sheriffs conceivably could raise a little bit of a problem. Do you think that because of your husband's previous occupation that you might be a little inclined to give what the officers say more weight than you would any other witness you didn't know?

MRS. CARN: I don't think that would; but I do not believe in capital punishment.

THE COURT: The question isn't, ma'am, whether you believe in capital punishment or not; the question is whether or not you have such a strong disbelief in it as to make it unable for you to vote to return

a recommendation of the death penalty regardless of what the evidence might be.

MS. CARN: That's right.

THE COURT: All right, ma'am. Then we will excuse you then right now. I appreciate your candor.

* * * * *

[The court] I have asked the others and I will ask each of the four of you whether you have such strong religious, conscientious or moral principles against the imposition of the death penalty that you would be unwilling to vote to return a recommended sentence of the death penalty regardless of what the evidence or the facts might be?

Would you Ms. Pigeon?

MS. PIGEON: Yes, sir.

THE COURT: Mr. Wall?

MR. WALL: No, sir.

THE COURT: How about you, Ms. Maher?

MS. MAHER: Yes, I do have such convictions. I am a Seventh Day Adventist.

THE COURT: And no matter what

the evidence showed you don't think you would vote for it?

MS. MAHER: I couldn't, sir.

THE COURT: Very well, over the objections of the defendant she will be excused.

(Ms. Maher was excused from the jury box.)

* * * * *

THE COURT: Do you have any religious, moral or conscientious principles against the death penalty that are so strong that you would be unwilling to vote to recommend the death penalty regardless of what the facts might be?

* * * * *

CLERK: Theodore T. Murphy. Number 87.

(Mr. Murphy was seated in the jury box.)

THE COURT: Mr. Murphy, what is you occupation?

MR. MURPHY: Retired.

THE COURT: What did you do prior to retirement, sir?

MR. MURPHY: Several jobs. I

was eight and a half years in the administration office in a seminary, before that I was thirty years with the utilities.

THE COURT: What seminary were you with, sir?

MR. MURPHY: St. Pios, Uniondale, New York.

THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?

MR. MURPHY: Yes, I have.

THE COURT: All right, sir, you will be excused then.

(Mr. Murphy left the jury box.)

The Magistrate characterized the examination of juror Varney (at the beginning) and juror Murphy (at the end) as too "cursory" and "abbreviated," and concluded that, as to them, "the hard question was not asked." (Magistrate's

Report and Recommendation, page 30).

Apart from the relative length of the examination - - which has no legal significance -- I am at a loss to understand the Magistrate's conclusion that the "hard" question was not asked. Clearly, the hard question was asked, repeatedly and without deviation from the minimal requirements of Witherspoon. In each instance the jurors were interrogated as to whether they would be "unwilling" or "unable" to recommend a death sentence "regardless of the facts" or "regardless of the evidence."

The jurors who were excused gave affirmative responses to those "hard" questions and they were properly dismissed.*

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*In addition to finding the questions of the court to be insufficient in form, the Magistrate also found the response of juror Varney to be ambiguous when he ultimately answered "I believe I would." It must be noted, however, that Mr. Varney first gave an unqualified yes in answer to the question whether he would

*footnote continued

be "unwilling under any circumstances to recommend the death sentence." Because of his affirmative response the Court pressed the subject with another question and he declared, again, "I believe I would." Nothing more was required. A juror should be subjected to voir dire examination, not cross examination.

This is not a case like Adams v. Texas, ___ U.S. ___, 100 S.Ct. 2521 (1980), or Burns v. Estelle, supra, in which prospective jurors were merely asked whether the specter of the death penalty might "affect" them in their deliberations; nor is it a case like Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138 (1969), or Maxwell v. Bishop, 398 U.S. 262, 90 S.Ct. 1578 (1970), in which some prospective jurors were asked only if they had any "fixed opinions" or "feelings," or whether they harbored any scruples about capital punishment which "might" prevent such a verdict. Rather, the voir dire examination in this case is indistinguishable

from the approved examination of the regular members of the jury in Smith v. Whisman, 431 F.2d 1051, 1058 (5th Cir. 1970), in which jurors were asked whether their opposition to capital punishment would prevent them from returning a death verdict "under any circumstances." See also Boulden v. Holman, supra, in which the Court approved the excusal of those jurors who simply stated that they would "never" impose a death sentence.

There was no Witherspoon violation in this case.

IV Conclusion

The Petitioner's trial was not perfect, but neither was it fundamentally unfair. His jury was properly examined on voir dire and none was excused merely because of expressed opposition to capital punishment. His other claims of constitutional deprivation were determined by the Magistrate to be unfounded,

and in that the Magistrate was correct.

The petition for a writ of habeas corpus pursuant to 28 USC §2254 is DENIED, and the stay of the warrant is DISSOLVED. The Clerk is directed to enter final judgment.

V Epilogue

The Turman murder occurred in 1973. Darden was quickly apprehended, and was promptly tried, convicted and sentenced within a year. His direct appeal was decided by the Supreme Court of Florida in 1976, and the following year the Supreme Court of the United States discharged a writ of certiorari previously granted. Clemency proceedings occupied the next two years, and the Governor ultimately signed a death warrant in May, 1979. Petitioner then filed the instant petition in this Court, pursuant to 28 USC §2254, almost six years after the offense.

The nature of the case, and others like it, has attracted intensive publicity which has, in turn, served to fuel a growing public frustration concerning the administration of criminal justice in the courts. The Chief Justice of the United States in his last annual address to the American Bar Association recognized and gave voice to the same public frustration; and, to the extent that this very real exasperation is fomenting and overall loss of confidence on the part of the public in its court system, particularly the federal courts, those who supply the public with information and opinion should be particularly careful to impart only that information which is accurate in every detail. Unfortunately, many lay persons and even some lawyers and judges do not seem to understand the historical or the contemporary role of the federal courts in habeas corpus

proceedings involving state prisoners, and that lack of understanding has caused the public to be the recipient of a considerable quantity of misinformation and erroneous innuendo concerning the proper institution of government upon which responsibility should be placed for both the condition and the cure.

The Constitution of the United States, Article I, Section 9, Clause 2, the so-called non-suspension clause, provides as follows:

> "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Many seem to believe that this constitutional provision is the direct jurisdictional base of habeas corpus proceedings involving state prisoners. That conclusion is open to substantial doubt. Until 1867, or during the first seventy-eight years of constitutional government,

the writ of habeas corpus in the federal courts was governed by the Judiciary Act of 1789 and extended only to prisoners held in custody by the United States, not the several states. Furthermore, even with respect to federal prisoners, the scope or power of the writ was limited to an inquiry as to the jurisdiction of the sentencing tribunal.

In 1867 the availability of the writ of habeas corpus in the federal courts was extended to state prisoners by act of congress now embodied in 28 USC §2254. Even then, however, the early cases limited the reach of the writ to an examination of the jurisdiction of the sentencing court. See Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037 (1976). See also Schneckloth v. Bustamonte, 412 U.S. 218, 250, 93 S.Ct. 2041, 2059 (1973) (Powell, J., concurring), and Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977).

Recently, in Swain v. Pressley, 430 U.S. 372, 94 S.Ct. 1224 (1977), dealing with the statute creating the Superior Court of the District of Columbia, the Court's decision suggests that the District Courts might well be relieved, with constitutional impunity, of any jurisdiction to issue writs of habeas corpus at the behest of state prisoners so long as state law affords an adequate and effective collateral remedy to test the legality of the petitioner's detention.

In any event, whether the constitution has etched the writ in stone to any degree or not at all is not the point here. It is enough that the existing statutes, 28 USC §§ 2241 and 2254, afford the remedy and thus require the District Courts to entertain a state prisoner's application for a writ of habeas corpus if it is claimed that he is detained in custody in violation of the Constitution

or laws or treaties of the United States. Moreover, the fact that the state courts have heard and adjudicated the constitutional claim does not generally* preclude the authority and duty of the District Court to make an independent determination of the constitutional issue. Indeed, as a matter of comity to the state courts, the statute requires that all existing state remedies be exhausted before the petition is filed in the federal court so that, of necessity, the habeas proceeding is always a re-hashing of the constitutional issues already decided in the state courts.

The point of this discussion is that, while there is great clamor for statutory redress of our present law concerning habeas corpus relief, all involved should

*Stone v. Powell, supra, dealing with Fourth Amendment issues, constitutes an exception.

remember (or should be clearly informed, as the case might be) that the existing law is itself of statutory origin. It was not created, and cannot be amended, by the courts. Given the statute it would be a gross violation of law and of a judge's oath of office if he should arbitrarily decline to entertain a proper petition filed under it; and to the extent there is widespread belief that the federal courts have somehow "bootstrapped" their own authority to indiscriminately meddle in state court criminal prosecutions - - a belief nurtured by inferences to that effect in the public press -- unjustified and unnecessary damage is being done to the very system of judicial administration in which all of us are so vitally interested. Those who wish to debate the need for change should focus their attention and the brunt of their remarks upon the statute and the Congress,

not the Courts.

In addition to substantive issues, there is also public concern about the length of time taken by the courts in disposing of habeas corpus proceedings. Quite apart from the notoriously crowded dockets of the federal courts, however, a circumstance which is also beyond the control of the courts, there is no provision in 28 USC §2254 requiring expedited consideration whereas there are at least two dozen other statutes which do require that preference be given to specified classes of cases such as, for example, criminal cases governed by the Speedy Trial Act, 18 USC §3161.*

*A habeas corpus proceeding under 22 USC §2254 is a civil case in the federal court. Examples of other statutes requiring expedited consideration of certain civil cases are 42 USC §2000e-5(f)(5), Equal Employment Opportunity Act; 42 USC §1971(g), Voting Rights Act; 29 USC §1303(e)(4), Employee Retirement Income Security Act; 42 USC §504(e), Social Security Act.

Whatever the future may hold for habeas proceedings instituted by state prisoners generally, and whatever the public perspective may be, the case of Willie Jasper Darden has been thoroughly, thoughtfully and quietly considered under the statute and the Constitution, and judgment will now be entered as directed. The Petitioner may then seek timely review by the Court of Appeals, as is his right.

IT IS SO ORDERED at Tampa, Florida, this 8th day of May, 1981.

/s/ Wm Terrell Hodges
UNITED STATES DISTRICT JUDGE